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No. 02-1524 APR 17 2003

In The
Supreme Court of the United States

SHELLEY WEINSTOCK,

Petitioner,

v.

COLUMBIA UNIVERSITY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Three years ago, this Court held in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 146-47 (2000), that strong evidence of pretext creates an inference of discrimination. In *Reeves*'s wake, the courts of appeals have fallen into complete disarray on the following question of law:

What is evidence of "pretext"?

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PETITION FOR A WRIT OF CERTIORARI

Weinstock respectfully petitions this Court for a writ of *certiorari* to review a judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, affirming summary judgment for Columbia, is reported as *Weinstock v. Columbia University*, 224 F.3d 33 (2d Cir. 2000), and is reproduced in the Appendix beginning at App. 1. After pending for nearly two and half years, the petition for rehearing and rehearing en banc of that decision was denied without a reported decision on January 17, 2003, as shown in the Appendix at App. 53. The decision of the United States District Court for the Southern District of New York, granting summary judgment, is not printed in the Federal Reporter but is reported at No. 95 Civ. 0569 (JFK), 1999 WL 549006 (S.D.N.Y July 28, 1999). It is reproduced in the Appendix beginning at App. 78.

STATEMENT OF JURISDICTION

The judgment of the Second Circuit en banc denying rehearing was entered January 17, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42

U.S.C. § 2000e *et seq*. The relevant portion of Title VII provides:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer
>
> (1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . [.]

42 U.S.C. § 2000e-2(a)(1).

STATEMENT OF THE CASE

Petitioner Shelley Weinstock ("Weinstock" or "Petitioner") taught for eight years as an Assistant Professor in the Chemistry Department of Barnard College ("Barnard"), a small, undergraduate, liberal arts college for women. In the 1992-93 academic year, Petitioner became eligible for tenure. Tenure decisions for Barnard faculty are governed by an Affiliation Agreement between Barnard and Columbia University ("Columbia" or "Respondent"), a major research university with which Barnard maintains close institutional ties. The Affiliation Agreement grants Columbia the power to veto Barnard faculty members' candidacy and outlines the procedures that both institutions must follow to render a joint decision. Ambiguously, it states that while Barnard and Columbia tenured faculty members must be of comparable quality, fairness to Barnard requires that the different missions of the schools be taken into account. It is undisputed that Barnard, as a small undergraduate college, provides its faculty in the hard sciences (defined as biology, chemistry,

physics and mathematics) with substantially less resources than Columbia, a major research university. For example, Barnard faculty lack graduate students to assist with research and state-of-the-art laboratory facilities; Columbia has both in abundance.

Taking the first step in the joint tenure review process, Barnard's Chemistry Department approved Petitioner's tenure application. The vote was unanimous. Then Columbia's Chemistry Department approved Petitioner's candidacy, without a single negative vote. Petitioner was approved by Barnard's tenure committee, again unanimously, and by Barnard's president.

At that point, the process was turned over to Respondent, acting through its Provost, Jonathan Cole ("Cole"). Cole selected the members of the Ad Hoc Committee ("Ad Hoc") convened to assess Petitioner's promotion. According to the Affiliation Agreement, each Ad Hoc is to comprise two members from Barnard, two members from Columbia, and one outside evaluator from neither institution. Rather than selecting two professors from a science department at Columbia College – who were in the best position to understand the expectations for chemistry professors and the teaching mission of Barnard as an exclusively undergraduate institution – Cole hand-picked two professors he knew from Columbia's medical school, the College of Physicians and Surgeons. As could be expected, those professors, Alan Tall ("Tall") and Samuel Silverstein ("Silverstein"), were less well-positioned than Columbia College science professors would have been at evaluating Petitioner's teaching of undergraduates or her peer-reviewed publications within her discipline; more surprisingly, both testified to absolute ignorance of Barnard, with Tall confessing to not even knowing its location adjacent to Columbia College. Cole's failure to ensure that all

members of the Ad Hoc understood Barnard and its mission violated the Affiliation Agreement.

Cole appointed Tall as Chair of the Ad Hoc. By Respondent's own admission, its procedures require the Chair to contact members for scheduling and organizational purposes but to refrain from discussing the merits of the tenure decision until the meeting. It is uncontested that Tall divulged to Ad Hoc members his negative predisposition against Petitioner.

During the Ad Hoc, Tall and Silverstein made comments that other committee members interpreted as gender-biased. They adopted a patronizing tone toward Petitioner, called her by her first name although they had never met her, and described her teaching style as "nice" and in terms equivalent to "nurturing," establishing a counterpoint to what they characterized as her insufficiently hard-driving research. "Unfortunately for [Petitioner], a stereotypically 'feminine' person is not viewed in a male dominated field as a driven, scientifically minded, competitive academic researcher." (App. 47)[1]

Although the Affiliation Agreement required Respondent's provost to refrain from intervening in the Ad Hoc's deliberations, Cole participated actively in the meeting and made it clear that he opposed Petitioner's candidacy.[2]

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[1] While Petitioner does not challenge Respondent's right to set its own standards for research, Tall's and Silverstein's tone, gender stereotyped remarks, and citation of allegedly negative letters that never in fact existed call into question the validity of their application of Respondent's purported standard to Petitioner.

[2] At deposition, Cole denied having expressed any opinion in the Ad Hoc, which provided a reasonable trier of fact with reasons for

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The parties agree that Cole charged the Ad Hoc with assessing whether Petitioner would have received tenure at *Columbia* rather than Barnard.[3] Even applying that standard, the Ad Hoc voted in favor of granting tenure to Petitioner. Tall and Silverstein were the only dissenters.

At that point the decision was in Cole's hands. Although he was provided with a list of experts in Petitioner's field, he chose to circumvent the experts, instead seeking input from a member of Columbia's Chemistry Department whom Cole knew, who described Petitioner as not aggressive, not tough, a "perfectly nice person" and a "pushover." Cole vetoed the Ad Hoc's recommendation, citing his source's "additional information."

Because denying tenure to a candidate who musters a majority vote in the Ad Hoc is so rare, the Affiliation Agreement requires the Provost to provide a written explanation in such cases. Cole did not provide that explanation until he was twice prodded; ultimately, his explanation was that Petitioner's research was not up to Respondent's standards.[4] Of course, as a sociologist of science, Cole had no expertise with which to evaluate Petitioner's research; on the contrary, he had already

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questioning his credibility, as Judge Cardamone noted in dissent. (App. 39)

[3] "The differences between the two institutions render the provost's purported standard a false and impossible one." (*Id.*)

[4] Cole wrote that his explanation must necessarily be tailored to Respondent's stance as respondent to Petitioner's EEOC Charge. As Judge Cardamone phrased it in his strongly worded dissent, "One might fairly ask what defense would be needed if the reason given was not pretextual." (App. 42)

published his view that the low numbers of women receiving tenure in science was unrelated to discrimination and was entirely attributable to what he termed their lack of merit. Indeed, Columbia did have low numbers of tenured female faculty in the hard sciences, and those numbers increased by exactly zero under Cole's watch.

The year after Respondent denied tenure to Petitioner, it granted tenure to a male professor in the hard sciences, Timothy Halpin-Healy ("Halpin-Healy"). During deliberations, an Ad Hoc member stated that Halpin-Healy met Barnard's research standards but not Columbia's and that therefore he was deserving of tenure at Barnard. No one spoke out in disagreement of the expert assessment by one hard scientist of another's research. Moreover, Cole, though present, did not speak up to assert his litigating position: Respondent's allegedly unvarying practice of requiring candidates from Barnard to meet the standard required to obtain tenure at Columbia. Accordingly, the Ad Hoc voted unanimously in favor of granting tenure to Halpin-Healy.

On January 26, 1995, Petitioner filed an action in the Southern District of New York alleging sex discrimination in violation of Title VII.[5] The district court dismissed

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[5] Petitioner also asserted claims of sex discrimination under Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681 *et seq.* ("Title IX"), the New York Human Rights Law, Executive Code § 296 *et seq.* (the "Executive Law"), and the City of New York Human Rights Law, Administrative Code § 8-107 *et seq.* ("Administrative Law"). The district court had federal question jurisdiction over Petitioner's Title VII and Title IX claims pursuant to 28 U.S.C. § 1331 and assumed supplemental jurisdiction over Petitioner's non-federal claims pursuant to 28 U.S.C. § 1367. Petitioner does not challenge the Second Circuit's

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plaintiff's case on summary judgment on the ground that "[Petitioner] ha[d] not produced *any* evidence to support a finding that a triable issue of fact exists with respect to the pretextual nature of [Respondent's] stated legitimate, non-discriminatory reason for denying [Petitioner] tenure." (App. 77) (emphasis added) The district court discussed each piece of plaintiff's circumstantial evidence of discrimination separately, discarding each as without any probative value. For example, it trivialized as "inter-institutional politics" Petitioner's comparative evidence that Respondent had raised the bar to the level of Columbia's (rather than Barnard's) research standards especially for its consideration (and rejection) of Petitioner and had then lowered the bar back to Barnard standards for its approval of a male professor in the hard sciences at Barnard. (App. 75) Relying on *Fisher v. Vassar College*, 114 F.3d 1332, 1337 (2d Cir. 1997) (en banc), *overruled by Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), it held that even if the decision-makers had "intentionally dissemble[d]," no reasonable jury could find pretext. Similarly, the court held that deviations from standard procedures, and inconsistent explanations for those deviations, did not give rise to a suspicion of mendacity absent direct evidence linking those irregularities to Petitioner's gender. Most appalling, it held that descriptions of Petitioner as "nice" and "nurturing" could not, as a matter of law, represent feminine stereotyping:

> [M]en are frequently referred to as nice, as in 'He is a nice guy.' The suggestion that 'nice' is a feminine adjective or somehow implies femininity is

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holding that her other sex discrimination claims stand or fall with her Title VII action.

> further belied by the famous quote from the late Leo Durocher when he managed the Brooklyn Dodgers in the early 1940s. 'Nice guys finish last' is what Durocher said about the New York Giant Manager Mel Ott, who is now in the Baseball Hall of Fame.

(App. 71 n.6)

The Second Circuit majority affirmed, with a strong dissent from Judge Cardamone. Picking apart the record, the majority drew factual inferences against plaintiff to discredit each piece of evidence. Respondent alleged that the reason it had denied Petitioner tenure was that "she did not meet the standard of scholarship uniformly applicable within the University." (App. 13) Tellingly, the majority stated that "[t]here can be no doubt that this *was* a valid reason." (*Id.*) (emphasis added) Petitioner does not dispute that it *would be* a valid reason – *if believed by a trier of fact*. What Petitioner objects to is the majority's arrogation to itself of the jury's function, that is, deciding whether the reason stated as the employer's defense was in fact the real reason. Before it could reach those factual conclusions, the majority had to hold as a matter of law that a plaintiff, to smoke out unlawful discrimination, may not use the facts that her employer changed the rules and failed to play by its rules.

Even more egregiously, the Second Circuit interpreted decision-makers' comments made during the tenure review process (both during the Ad Hoc and in response to Cole's solicitation of additional information) as having nothing to do with either gender or discrimination (App. 17-18), whereas the dissent saw Petitioner's situation as "the mirror image of *Price Waterhouse* [*v. Hopkins*, 490 U.S. 228 (1989)]" (App. 47). The majority held that stereotypes could be considered to have motivated the decision-makers'

perception only if the stereotype was invoked as support for defendant's justification for the adverse action. (App. 18)

Finally, the Second Circuit erred in holding that consideration of the "scandal[ous]" statistics regarding Respondent's tenure practices in its Chemistry Department could not make a jury more likely to find discrimination than in the absence of those statistics.[6] It reasoned that the low number of women in Columbia's Chemistry Department, as published on Respondent's own web site, "provid[ed] no foundation for the assertion that there was discrimination in *Weinstock*'s tenure process." (App. 21) (emphasis in original) The majority transferred its (unsubstantiated) assumption that Petitioner was somehow immune from a lack of equal opportunity for all female faculty employed by Respondent into a holding that general workforce statistics are inadmissible as background evidence of discrimination.

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[6] It strains credulity to expect a jury to turn a blind eye to these cold facts: During the past forty years, Respondent has conferred tenure on only two female Chemistry professors. Even then, tenured women have never served in Columbia's Chemistry Department contemporaneously. It is undisputed that those women were considered head-and-shoulders above their male peers. Forgetting that Title VII provides equal treatment of women who are *as good as* men, the majority relied on Respondent's grand total of two tenured women in its Chemistry Department, notwithstanding their exceptional status. The Second Circuit's disregard of Petitioner's statistics also ignores that, when Respondent rejected Petitioner, it employed zero tenured women in its Chemistry Department.

REASONS FOR GRANTING THE PETITION

We recognize that this Court is concerned with the articulation of a uniform interpretation of Title VII, not the particular facts of Petitioner's case. Nonetheless, we have recited Petitioner's facts at some length to sharpen the critical question of law at stake: what this Court meant when it stated that a plaintiff "must . . . be afforded a fair opportunity to show that [defendant]'s stated reasons for [plaintiff]'s rejection was in fact pretext." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973). There are many possible ways that plaintiffs could prove pretext, and the federal courts of appeals have reached diametrically opposed conclusions on the relevance of each of the recurring types of evidence. With respect, Petitioner submits that the majority interpretation of *Reeves* comports with the prediction in Justice Ginsberg's concurring opinion:

> I write separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion for judgment as a matter of law. I anticipate that such circumstances will be uncommon.

Reeves, 530 U.S. at 154 (Ginsberg, J., concurring).

Reeves makes plaintiffs' establishment of pretext the heart of Title VII cases in the summary judgment and judgment as a matter of law postures. Yet the federal courts of appeals cannot agree on what counts as evidence of pretext. That threshold test of relevancy is a pure question of law, obviously distinct from the weight to be accorded to any particular factual allegation in each case's unique set of facts. *Reeves* exacerbated the outcome-determinative impact of such circuit splits. Far from

adopting a uniform interpretation of *Reeves* and its predicate definitional questions, the circuits have broadened their divergences on the following issues:

- whether irregular application to plaintiff of defendant's procedures and standards may be considered as evidence of pretext;
- whether challenges to tenure decisions require a greater quantum of evidence to show pretext than other cases;
- what, if any, nexus is required between remarks evincing proscribed stereotyping and defendant's articulated reason for its adverse action;
- whether the dearth of members of plaintiff's protected class in defendant's workforce is relevant circumstantial evidence; and
- under what conditions courts may require proof of more than plaintiff's prima facie case and pretext in light of *Reeves*.

I. THE FEDERAL COURTS OF APPEALS ARE DIVIDED AS TO WHETHER THE LEGITIMACY OF AN EMPLOYER'S REASON MAY BE UNDERMINED BY EVIDENCE OF A DEPARTURE FROM THE EMPLOYER'S GENERALLY APPLICABLE RULES OR STANDARDS.

A. The Federal Courts of Appeals Are Divided As to Whether a Jury May Infer Discrimination from Irregularities in an Employer's Procedures.

Logically, where an employer has failed to follow its own rules, an illegitimate motive is more likely than in cases where the employer has adhered to its uniform

procedures. Nonetheless, a 5-3 circuit split on whether procedural irregularities per se may support an inference of discrimination suggests a need for clarification.

Representing the minority view, the Second Circuit in the decision below ruled that plaintiff's evidence of multiple deviations from the Affiliation Agreement was not probative of discrimination absent direct evidence linking those procedural irregularities to Petitioner's gender. (App. 18)[7] Two other circuits have ruled that procedural irregularities by themselves may not support an inference of discrimination:

4th Cir. *Dugan v. Albermarle County Sch. Bd.*, 293 F.3d 716, 722 (4th Cir. 2002) (holding that failure to apply mandatory procedures for reduction-in-force does not support inference of discrimination)

7th Cir. *Stewart v. Henderson*, 207 F.3d 374, 378 (7th Cir. 2000) (affirming grant of summary judgment because defendant claimed that its failure to follow its promotion method was inadvertent rather than motivated by bias)

By contrast, five circuits have held in the wake of *Reeves* that alleged procedural irregularities are to be considered evidence of pretext:

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[7] "The very fact that the [pre-meeting] calls [in which Cole expressed his negative view of the merits of Petitioner's application] were made, that they were clearly inappropriate, and as such constituted procedural defects in the tenure review process, calls into question [Respondent]'s proffered non-discriminatory reason for denying [Petitioner] tenure." (App. 37)

5th Cir. *Blow v. City of San Antonio*, 236 F.3d 293, 297 (5th Cir. 2001) (reversing summary judgment on ground that reasonable jury could infer that "intentional and deliberate departure from stated policies" was motivated by discriminatory animus)

9th Cir. *Lyons v. England*, 307 F.3d 1092, 1116 (9th Cir. 2002) (holding that plaintiffs' showing that defendant had subverted established procedures for assignments and for promotions supported reasonable inference of discriminatory intent)

10th Cir. *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1220 (10th Cir. 2002) ("deviations from normal company procedure . . . provide support for [plaintiff's] pretext argument")

11th Cir. *Bass v. Board of County Comm'rs, Orange County*, 256 F.3d 1095, 1108-09 (11th Cir. 2001) (holding that deviations from standard procedure, including placing undue weight on single factor and failure to train evaluators about position at issue, constituted circumstantial evidence of discrimination)

D.C. Cir. *Jones v. Washington Metro. Area Transit Auth.*, 205 F.3d 428, 434 (D.C. Cir. 2000) (affirming finding of pretext on ground that firing plaintiff without offering her opportunity to explain alleged insubordination violated defendant's procedures)

Petitioner submits that evidence that an employer invented a heightened standard just for plaintiff is the quintessential example of the comparative evidence that this Court said was most relevant in *McDonnell Douglas*. In that case, plaintiff's former employer defended its refusal to hire him as the consequence of his involvement in civil disobedience against it. This Court held that, while "[n]othing in Title VII compels an employer to absolve or rehire one who has engaged in such deliberate, unlawful activity against it," plaintiff "must . . . be afforded a fair opportunity to show that [defendant]'s stated reasons for [plaintiff]'s rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against defendant of comparable seriousness to [plaintiff's] were nonetheless rehired." *Id.*, 411 U.S. at 804.

B. Where Employers Raise the Bar Especially for Members of the Protected Class, the Circuits Are Split as to Whether the Very Revision of Defendant's Standard Calls into Question its Legitimacy.

Although shifts in required qualifications necessarily trigger fairness concerns, whether such shifts raise an inference of unlawful discrimination is an open question of law. The Second Circuit below subscribed to the minority view and dismissed as irrelevant the dispute over whether Petitioner was indeed subjected to differential treatment. Respondent explained its decision to deny Petitioner tenure in Barnard's Chemistry Department by stating that she had failed to meet Columbia's standard for research. Petitioner introduced evidence that the decision-maker in her case had permitted a grant of tenure to Halpin-Healy, a male scientist at Barnard, despite an admission that his

research would not meet the standard for tenure at Columbia. Although such a discrepancy cuts to the heart of Title VII, the D.C. Circuit, like the Second, dismisses the probative value of evidence that defendant shifted its standards and applied stricter scrutiny to plaintiff. *See Forman v. Small*, 271 F.3d 285, 293 (D.C. Cir. 2001) (holding that "supposedly critical requirement" that promotion candidate complete book "vanished in later years" was insufficient to establish pretext).

The Second and D.C. Circuits' narrow definition of pretext is irreconcilable with the great weight of post-*Reeves* authority:

3d Cir. *Goosby v. Johnson & Johnson Med., Inc.*, 228 F.3d 313, 320 (3d Cir. 2000) (holding that, where white male employees were given assignments that did not comport with their scores on competency assessment tool, "a reasonable fact finder could . . . conclude that the [competency assessment tool] did not have the importance [defendant] claim[ed], and that [defendant]'s reliance on it to explain [plaintiff]'s placement [was] merely a pretext to cover . . . discriminatory motive in not recommending her for 'better' positions")

5th Cir. *Montemayor v. City of San Antonio*, 276 F.3d 687, 691 (5th Cir. 2001) (holding that evidence that successful candidates had "even worse backgrounds" supported verdict finding that "blemishes on [plaintiff's] record" were not real reason for denying her admission to police academy)

7th Cir. *Curry v. Menard*, 270 F.3d 473, 479-480 (7th Cir. 2001) (holding that evidence that two non-Black cashiers had cash discrepancies in their drawers but were neither suspended nor terminated established factual dispute as to whether decision-maker uniformly applied stated reason for terminating plaintiff)

10th Cir. *Dodoo v. Seagate Tech., Inc.*, 235 F.3d 522, 530 (10th Cir. 2000) (holding that fact that promotions involving comparable salary increases, duties and departments were not cancelled, as was promotion promised to plaintiff, supported jury finding that alleged job freeze was pretext)

11th Cir. *Sledge v. Goodyear Dunlop Tires N. Am., Ltd.*, 275 F.3d 1014, 1020 (11th Cir. 2001) (per curiam) (holding that plaintiff's failure to pass written examination was pretext for not promoting him, because white applicants were promoted after failing test or without having to take test)

The cases listed above got the rule right. The minority view effectively requires direct evidence within a burden-shifting scheme designed to allow plaintiffs to prove their cases entirely by circumstantial evidence, thereby repeating the same error that caused this court to unanimously reverse the lower court in *United States Postal Services Board of Governors v. Aiken*, 460 U.S. 711 (1983). Because "there will seldom be eyewitness testimony as to the employer's mental processes," *id.* at 716, the very

existence of procedural irregularities provides relevant evidence of discrimination.

II. THE CIRCUITS ARE SPLINTERED THREE WAYS AS TO WHETHER ACADEMIC INSTITUTIONS' RATIONALES FOR DENYING TENURE ARE ENTITLED TO SPECIAL DEFERENCE ON SUMMARY JUDGMENT.

It is no coincidence that both *Weinstock* and *Forman* – which together establish the minority rule dismissing the significance of comparative evidence – are challenges to denials of tenure.[8] Although since 1972 Title VII has carved out no exception for academic institutions, Act of Mar. 24, 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e-1), it is difficult to imagine any federal court of appeals ruling out evidence as basic as the comparison with Halpin-Healy if the context were anything other than the denial of tenure and if the employer were anything other than a university, a sacred cow traditionally impervious to judicial review. Although this Court has rejected the argument that academic autonomy shields tenure decisions from the same enforcement procedures applicable to other employment decisions, *see University of Pa. v. EEOC*, 493 U.S. 182, 190 (1990), this Court has not ruled directly on the corollary question: whether courts on dispositive motions must substitute any meaningful

[8] The non-competitive promotion sought by Forman, a curator at the Smithsonian Institution specializing in the history of science, bears the relevant characteristics of a tenure decision in that it hinges on a similar (highly subjective and expert-driven) evaluation of research and publications within the field. *See Zahorick v. Cornell Univ.*, 729 F.2d 85, 93 (2d Cir. 1984).

analysis for unyielding deference to an academic institution's bare invocation of scholarly standards.

Despite the passage of time since the *University of Pennsylvania* decision, not to mention the amendment to Title VII, the circuits have been unable to settle on a uniform standard for balancing universities' academic freedom against plaintiffs' opportunity to show that an academy's reason was designed to mask unlawful discrimination. The Second Circuit, in the decision below (App. 13, 22), *Fisher v. Vassar Coll.*, 114 F.3d 1332 (2d Cir. 1997) (en banc), *overruled on other grounds by Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), and *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 455-56 (2d Cir. 1999), and the D.C. Circuit, in *Forman*, are not the only federal courts of appeals to have demonstrated complete obeisance to the universities' purported reliance on judgments as to the quality of candidates' research. In *Elsayed Mukhtar v. California State University, Hayward*, 299 F.3d 1053, 1067 (9th Cir. 2002), the Ninth Circuit held that lay opinion testimony that plaintiff was qualified for tenure and arbitral findings of procedural errors in the tenure process has no probative value and was "a mere difference of academic opinion." "Indeed, academic tenure decisions involve subjective judgments on scholarship that neither courts nor juries are well qualified to make." *Id.*

At the opposite extreme are two circuits that apply the same standards to universities as to other defendants whose rationales are challenged as pretextual:

3d Cir. *Abrams v. William Patterson Coll. of N.J.*, 260 F.3d 265, 283-84 (3d Cir. 2001) (applying standard for "how much evidence of pretext a plaintiff needs to avert summary judgment" developed in non-academic case and finding that

plaintiff had "'demonstrate[d] such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions' such that 'a factfinder could reasonably . . . disbelieve the employer's articulated legitimate reasons'") (citing *Fuentes v. Perskies*, 32 F.3d 759, 764 (3d Cir. 1994)); *accord Bennun v. Rutgers State Univ.*, 941 F.2d 154, 177-79 (3d Cir. 1991) (affirming finding that university's allegation of inadequate research was unworthy of credence because plaintiff "was held to a higher standard" for research than colleague, and defining universe of permissible comparators broadly in order to avoid "effectively isolat[ing] a university's promotion and tenure decisions from meaningful judicial review")

8th Cir. *Kobrin v. University of Minn.*, 34 F.3d 698, 703 (8th Cir. 1994) (applying ordinary standard and finding pretext based on evidence that department ignored purportedly sought-after core areas of research interest in selection process)

The First Circuit has staked out a middle position between total deference and no deference: "an inference of discrimination can be derived from a showing that a university's given reasons for denying tenure to the plaintiff were 'obviously weak or implausible,' or that the tenure standards for prevailing at the tenure decisions were 'manifestly unequally applied.' The essential words here are 'obviously' and 'manifestly.'" *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 346 (1st Cir. 1989). This three-way circuit split on whether employees denied tenure are

to be afforded a less "fair opportunity to show that [defendant's] stated reasons for [plaintiff's] rejection was in fact pretext," *McDonnell Douglas*, 411 U.S. at 804, merits this Court's review.

III. THE SAME BIASED COMMENT MADE UNDER IDENTICAL CIRCUMSTANCES WILL BE TREATED AS AN IRRELEVANT "STRAY REMARK" IN SOME CIRCUITS, AS CIRCUMSTANTIAL EVIDENCE IN OTHERS, AND AS DIRECT EVIDENCE SUFFICIENT TO SHIFT THE BURDEN OF PROOF IN STILL OTHERS.

In *Reeves*, this Court took into account stereotypical comments even though they were not uttered in the context of the adverse action, let alone made in support of the adverse action (as the Second Circuit would demand). Reeves was having difficulty starting a machine when he was told that he was "too damn old to do his job," and on a separate occasion was informed that he "was so old [he] must have come over on the Mayflower." *Reeves*, 530 U.S. at 151. For firing him, defendant pointed to alleged inaccuracies in recording his subordinates' time – a reason having nothing to do with his dexterity with machines or his arrival in the United States. "*Reeves* emphatically states that requiring evidence of discriminatory animus to be 'in the direct context' of the employment decision is incorrect." *Evans v. City of Bishop*, 238 F.3d 586, 591 (5th Cir. 2000) (per curiam); *accord Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 229 (5th Cir. 2000) ("In light of the Supreme Court's admonition in *Reeves*, our pre-*Reeves* jurisprudence regarding so-called 'stray remarks' must be viewed cautiously.")

The Second Circuit held that decision-makers' descriptions of Petitioner as "nice," nurturing, not aggressive, not

tough, and a "pushover" could not be relevant to the ultimate issue of discrimination because Respondent had the good sense to refrain from expressly linking the stereotypes to its alleged reason for failing to promote her. (App. 18) In so doing, it disagreed with the circuits that consider stereotyping remarks as indirect evidence even when those remarks do not relate to the employer's stated reason for the adverse action:

1st Cir. *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2002) (holding that expressions of opposition to female employees with children showed that workplace infractions cited as reasons for firing plaintiff were pretextual)

5th Cir. *Evans v. City of Bishop*, 238 F.3d 586, 591 (5th Cir. 2000) (per curiam) (holding that "it would be proper for a jury to take this evidence [of racially derogatory comments] into account," although those comments were unrelated to defendant's claim that "economic factors and qualifications motivated its" adverse action).

9th Cir. *Mangold v. California Pub. Utils. Comm'n*, 67 F.3d 1470, 1473, 1476-77 (9th Cir. 1995) (considering evidence of age-biased comments that did not address defendant's proffered reason of plaintiffs' performance on examinations)

Indeed, the precondition the Second Circuit set for indirect evidence is one that other circuits have rejected as excessive for even direct evidence. "It would cripple

enforcement of the employment discrimination laws to insist that direct evidence take the form of an employer's statement to the effect that 'I'm firing you because you're in a protected group." *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044 (7th Cir. 1999). *See id.* at 1044-46 (recognizing that comments stereotyping pregnant women had probative value even where they did not rebut proffered reason of poor interpersonal skills); *see also Wright v. Southland Corp.*, 187 F.3d 1287, 1303-04 & n.19 (11th Cir. 1999) (holding that comments regarding older workers' alleged incompetence with computer programs was direct evidence of age-based animus, where employer justified its decision by pointing to "problems relating to merchandise control and accounting procedures," rather than any unsubstantiated difficulties with computers). The lower courts need guidance as to how plaintiffs may show that the employer actually relied on the protected characteristic in making its decision.

IV. THE CIRCUITS PROVIDE OPPOSITE ANSWERS TO THE BASIC QUESTION OF WHETHER DEFENDANT'S WORKFORCE COMPOSITION MAY BE RELEVANT BACKGROUND EVIDENCE.

Furnco Construction Co. v. Waters, 438 U.S. 567, 579-80 (1978), stands for the proposition that fairness to defendants entitles juries to consider evidence that the workforce was balanced and proportionately representative of plaintiffs' protected class. If such evidence can be used to undermine an ultimate determination that defendant's motive was discrimination, then surely the converse should be true, and plaintiffs ought to be entitled to rely on workforce *im*balance as background evidence pointing to, at the very least, a climate or history of exclusion.

Nonetheless, in the decision below, the majority brushed aside evidence from Respondent's own web site demonstrating the dearth of female science professors on whom Respondent had conferred tenure. Those numbers were presented for the modest purpose of providing general background evidence of discrimination. The majority held any and all numbers to be irrelevant insofar as they addressed discrimination against women other than Petitioner. Two other circuits have similar rules:

> 8th Cir. *Borgen v. Minnesota*, 236 F.3d 399, 406 (8th Cir. 2000) (holding that fact that plaintiff was only female black trooper ever employed by defendant was "generic type of employment statistics . . . not probative of the reason for [plaintiff's] termination")
>
> 9th Cir. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1283 (9th Cir. 2000) (holding that statistics are not useful in proving pretext unless they address "the specific decision affecting the individual plaintiff" rather than adverse action against plaintiff's "protected class in general")

By contrast, the same evidence would be relevant, though not dispositive, in the Sixth Circuit:

> While by itself [the statistical composition of the faculty] does not prove that [plaintiff] in particular was a victim of discrimination, it does add 'color' to the decision-making process at [defendant] and to the reasons given for [plaintiff's] non-promotion. Proof of a general atmosphere of discrimination is not the equivalent of proof of discrimination against an individual, but evidence of such an atmosphere may be considered along with any other evidence bearing on motive

> in deciding whether a Title VII plaintiff has met her burden of showing that the defendants' reasons are pretexts.

Sweeney v. Board of Trs. of Keene State Coll., 604 F.2d 106, 113 (1979). Because this question lurks in every Title VII case, *see McDonnell Douglas*, 411 U.S. at 805 n.19, it requires a single answer.

V. *REEVES* HAS NOT RESOLVED WHETHER A PLAINTIFF, ABSENT UNUSUAL CIRCUMSTANCES, WILL DEFEAT SUMMARY JUDGMENT BY PROVING A PRIMA FACIE CASE AND INTRODUCING EVIDENCE THAT THE EMPLOYER'S EXPLANATION WAS FALSE.

Less than three years after *Reeves*, confusion reigns as to whether an employer is entitled to summary judgment when a plaintiff has proved her prima facie case and has introduced evidence sufficient for a jury to reject the employer's explanation. Six federal courts of appeals have interpreted *Reeves* as requiring plaintiffs opposing judgment as a matter of law to submit evidence beyond those two categories only in "unusual circumstances." However, the Second and Eighth Circuits have articulated a rule of law that requires most plaintiffs to show something more than a prima facie case plus pretext to survive summary judgment. Because those different standards impose unjustified burdens on multi-state employers and undermine congressional intent to extend uniform protection against discrimination to workers across the land, this circuit split, resurrected despite *Reeves*, cries out for resolution.

The Second Circuit itself has acknowledged the split in the circuits:

> Since *Reeves*, the case law has been developing as to what sort of record will permit a plaintiff who presents evidence of a *prima facie* case and evidence of a pretext to have a jury consider the ultimate issue of discrimination and what sort of record will entitle a defendant to judgment as a matter of law.

Zimmerman v. Associates First Capital Corp., 251 F.3d 376, 381 (2d Cir. 2001). After discussing the articulation of the rule of *Reeves* in other circuits,[9] the Second Circuit admitted to taking the minority approach:

> Our Circuit has not read *Reeves* quite as favorably to Title VII plaintiffs. Without insisting on unusual circumstances or evidence precluding a finding of discrimination, as the Fourth and Fifth Circuits have done, we have simply ruled in several cases that a record that included evidence of a *prima facie* case and evidence permitting a finding of pretext did not suffice to permit a finding of discrimination. *See Slattery v. Swiss Reinsurance American Corp.*, 248 F.3d 87, 84 (2d

[9] See *Blow*, 236 F.3d at 298 ("a straightforward application of Reeves" means that where plaintiff has shown pretext, summary judgment will be denied except in "*unusual* circumstances that would *prevent a rational fact-finder* from concluding that the employer's reasons . . . were discriminatory and in violation of Title VII") (emphasis added); *Evans*, 238 F.3d at 592 ("The Supreme Court in *Reeves* emphasized the importance of jury fact finding and reiterated that evidence of the prima facie case plus pretext may, *and usually does*, establish sufficient evidence for a jury to find discrimination.") (emphasis added); *Rowe v. Marley Co.*, 233 F.3d 825, 830 (4th Cir. 2000) ("courts *may not* require a plaintiff who proves both a prima facie case and pretext to produce additional proof of discrimination in order to survive a defendant's motion for summary judgment" unless "there is evidence that *precludes* a finding of discrimination") (emphasis added).

> Cir. 2001); *James v. New York Racing Ass'n*, 233 F.3d 149, 157 (2d Cir. 2000); *Schnabel v. Abramson*, 232 F.3d 83, 91 (2d Cir. 2000). The task, as outlined in these decisions, is to examine the entire record and, in accordance with *Reeves*, make the case-specific assessment as to whether a finding of discrimination may reasonably be made.

Zimmerman, 251 F.3d at 382.[10]

Since *Zimmerman*, the Eighth Circuit has joined the Second Circuit in subscribing to the minority interpretation of *Reeves*. In *Mayer v. Nextel W. Corp.*, 318 F.3d 803, 808 & n.5 (8th Cir. 2003), the court assumed that the plaintiff had presented sufficient evidence to create a factual issue as to whether defendant's reasons were pretextual, but nonetheless affirmed the grant of summary judgment. In direct contravention of the Fourth Circuit's presumption against summary judgment except where a finding of discrimination would be "precluded" by uncontroverted evidence, the Eighth Circuit wrote that plaintiff's reliance on the absence of any evidence excluding age discrimination as the real reason "misse[d] the mark." *Id.* at 810.

As *Zimmerman* admits, the Fifth and the Fourth Circuits have adopted the majority rule, and while they

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[10] Thus, the Second Circuit has resurrected the "pretext-plus" rule of *Fisher*, 114 F.3d at 1338, notwithstanding this Court's citation of *Fisher* as representative of the losing side of the circuit split that *certiorari* was granted to resolve. *See Reeves*, 530 U.S. at 140; *but see id.* at 148 (quoting with approval *Fisher*, 114 F.3d at 1338, for the limited proposition that "[I]f the circumstances show that the defendant gave the false explanation to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent" (alteration in original)).

have expounded upon it at the greatest length,[11] they are not the only ones to embrace what the Fifth Circuit has termed the "permissive pretext only" interpretation of *Reeves*:

3d Cir. *Goosby v. Johnson & Johnson Med., Inc.* 228 F.3d 313, 321 (3d Cir. 2000) (reasoning that "[i]nasmuch as there are genuine issues of material fact as to [defendant]'s motives in assigning [plaintiff] to the [allegedly undesirable] position, we hold that the district court erred in granting [defendant] summary judgment on that portion of [plaintiff]'s claim")

4th Cir. *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 648-49 (4th Cir. 2002) (holding that, where plaintiff's evidence was "limited . . . to her prima facie case and facts tending to discredit [defendant's] explanations," "the examples provided in *Reeves* do preclude us from ordering judgment as a matter of law when a defendant has merely made a lesser evidentiary showing" than "*conclusive*[ ] [proof] of some other, non-discriminatory reason for the employer's decision" or "*abundant and uncontroverted* . . . evidence that no discrimination occurred")

[11] Like the Second Circuit's, the Fifth and the Fourth Circuits' precedents were overruled by *Reeves*. *See Reeves*, 530 U.S. at 140 (citing *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996), and *Theard v. Glaxo, Inc.*, 47 F.3d 676 (4th Cir. 1995) as representing pretext-only test).

(emphasis in original); *accord EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 854 (4th Cir. 2001) (holding that, "in the absence of evidence *requiring* . . . a conclusion [of no discrimination], a prima facie case and evidence of pretext raises a sufficient inference of discrimination to *entitle* a plaintiff to survive a motion for summary judgment") (emphasis added)

5th Cir. *Ratliffe v. City of Gainesville*, 256 F.3d 355, 361-62 (5th Cir. 2001) (holding that "pretext plus" standard, defined as requirement that plaintiff not only disprove employer's proffered reasons but also introduce additional evidence of discrimination, was replaced by *Reeves*'s "permissive pretext only standard," under which "if the plaintiff establishes that the defendant's reasons are pretextual, *the trier of fact is permitted, but not required,* to enter judgment for the plaintiff") (emphasis added); *but see Vadie v. Mississippi State Univ.*, 218 F.3d 365, 373 n.23 (5th Cir. 2000) (dismissing *Reeves* as inapplicable because plaintiff's other evidence of discrimination was less "substantial" than Reeves's and plaintiff failed to prove that employer's reason was "patently false")

7th Cir. *Allen v. Chicago Transit Auth.*, 317 F.3d 696, 699 (7th Cir. 2003) (citing *Reeves* as support for holding that "[w]hen . . . the employer offers a non-invidious reason that a jury would be

free to disregard because the genuineness of the reason has been challenged by substantial evidence, summary judgment for the employer is improper")

10th Cir. *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 12 .7-1220 (10th Cir. 2002) (reversing grant of summary judgment because plaintiff had shown pretext)

11th Cir. *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340, 1346 (11th Cir. 2000) (holding that *Reeves* permits plaintiff to satisfy ultimate burden of proving intent by undermining legitimacy of employer's proffered reason and observing that "[t]o require otherwise would impose on the plaintiff the encumbrance of producing direct evidence of discrimination within an evidentiary framework specifically designed for situations in which no such evidence is available")

The significance of a showing of pretext, however defined, to dispositive motions requires clarification.

CONCLUSION

The Second Circuit's opinion below falls squarely within well-developed circuit splits as to:

- whether *Reeves* establishes a general rule that issues of pretext merit a jury determination of discrimination;

- what categories of evidence may be considered in deciding whether plaintiff has created a factual issue as to pretext; and
- whether the standards for dispositive motions apply with equal force to challenges to academic institutions' tenure decisions.

Because neither *Reeves* nor the *University of Pennsylvania* has resolved the disarray, this Court should grant the petition for *certiorari*.

Dated: New York, New York
April 17, 2003

Respectfully submitted,

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224 F.3d 33 (2nd Cir. 2000)

Shelley WEINSTOCK, Plaintiff-Appellant,

v.

COLUMBIA UNIVERSITY,
Defendant-Appellee.

Docket No. 99-7979.

United States Court of Appeals,
Second Circuit

Argued March 9, 2000

Decided Aug. 23, 2000

Anne C. Vladeck, Vladeck, Waldman, Elias & Engelhard, P.C., New York, N.Y. (Anne L. Clark, Kevin T. Mintzer, of counsel), for Plaintiff-Appellant.

Mark L. Goldstein, Goldstein & Morris, LLP, New York, N.Y. (Andrea H. Stempel, of counsel), for Defendant-Appellee.

Beth H. Parker, Equal Rights Advocates, San Francisco, CA, for amici curiae American Association of University Women, Association for Women in Science and New York Chapter of the National Employment Lawyers Association.

Before: CARDAMONE, McLAUGHLIN, and PARKER, Circuit Judges.

CARDAMONE, Circuit Judge, dissents in a separate opinion.

McLAUGHLIN, Circuit Judge:

BACKGROUND

This case arises from Columbia University's denial of tenure to Shelley Weinstock. Weinstock contends that the decision to deny her tenure was the result of discrimination on the basis of her gender. Because this is an appeal from a grant of summary judgment to the defendant, we recite the facts in the light most favorable to the plaintiff, the nonmoving party. *See Bedoya v. Coughlin,* 91 F.3d 349, 351 (2d Cir.1996).

Weinstock was employed by Barnard College, an undergraduate college and affiliate of Columbia, as an Assistant Professor in its Chemistry Department from July 1985 to June 1994. Weinstock became eligible for tenure during the Spring semester of the 1992-1993 academic year. Pursuant to an affiliation agreement between Columbia and Barnard, the Byzantine tenure process for Barnard faculty proceeds through the following votes.

First, (1) the faculty member's academic department at Barnard; (2) the Barnard Committee on Appointments, Tenure and Promotions; and (3) the counterpart department at Columbia, all must vote in favor of tenure. Then, Barnard's President decides whether to recommend that the process move forward. If the President of Barnard votes favorably, she forwards the nomination to the Provost of Columbia. The Provost then convenes a five-person University *ad hoc* committee to review the nomination. Under the terms of the affiliation agreement, the *ad hoc* committee consists of two faculty members designated by the Provost, two Barnard faculty members, and one faculty member from an outside institution. The tenure appointment will be made if: (1) the review of the *ad hoc*

committee is favorable; (2) the Provost accepts that review; (3) the President of Columbia follows the advice of the Provost; and, finally, (4) the Trustees of Barnard and Columbia grant tenure.

Weinstock received the support of: (1) the Barnard Chemistry Department; (2) the Barnard Committee on Appointments, Tenure and Promotions; and (3) the Columbia Chemistry Department. The President of Barnard, Ellen Futter, who initially had reservations about Weinstock's scholarship, then recommended that Weinstock's nomination be moved forward.

As required by the affiliation agreement between Barnard and Columbia, the Provost of Columbia, Jonathan Cole, convened an *ad hoc* committee. He appointed Professor Alan Tall, the Chair of Columbia's Department of Medicine, as the committee's Chair. He also appointed Professor Samuel Silverstein of Columbia's Department of Physiology and Cellular Biophysics, Professor Zanvil Cohn of Rockefeller University, Professor Lila Braine of Barnard's Department of Psychology and Professor Paul Hertz of Barnard's Department of Biological Sciences, as the committee's other members.

Protocol permits the Chair of an *ad hoc* committee to contact committee members before their meeting to determine whether they need more information to complete the candidate's file. Tall telephoned the committee members to discuss Weinstock's file, and to determine if any committee member wanted additional information. According to committee members Braine and Hertz, Tall also told each of them on the phone that he thought there were problems with Weinstock's candidacy. Both Braine and Hertz (from the Barnard faculty) reported these

remarks, which they considered as going beyond a mere inquiry about lack of information, to Barnard's Dean, Robert McCaughey.

The *ad hoc* committee met on April 12, 1993. Present were all the committee members, Provost Cole and Dean McCaughey. At the outset of the meeting, Dean McCaughey questioned the extent of Tall's telephone calls to Professors Braine and Hertz. Provost Cole inquired whether any of the committee members' opinions of Weinstock had been tainted by their conversations with Tall. None of the members complained that they had been influenced. Provost Cole also reminded the *ad hoc* committee that the standards for tenure at Columbia were high, because Columbia is an internationally renowned research university. Professor Sally Chapman, the Chair of Barnard's Chemistry Department, then presented Weinstock's case for tenure.

During the meeting, committee members Tall and Silverstein referred to Weinstock, whom they had never met, by her first name, "Shelley," and allegedly commented that she seemed "nice." Weinstock also alleges that she heard from Chapman and Hertz that Tall and Silverstein observed that she (Weinstock) seemed "nurturing." However, neither Hertz, Silverstein nor Tall remembers hearing the word "nurturing."

Tall and Silverstein deemed Weinstock's publications and research papers insufficient to merit tenure. In their depositions, they testified that her research lacked originality and that the journals in which she published were not first-tier scientific journals. Tall and Silverstein were also unimpressed with Weinstock's letters of recommendation. Silverstein noted that the letters were lukewarm by

comparison to letters he had examined in other tenure reviews.

The committee eventually voted 3-2 to grant Weinstock tenure. Braine, Hertz, and Cohn voted for tenure; Tall and Silverstein voted against it. A 3-2 favorable vote is considered "underwhelming [in terms of] support," according to Columbia's current President, George Rupp. From 1989 to the present, at least six tenure candidates (five male, one female) were denied tenure after a 3-2 *ad hoc* committee vote in favor of granting tenure.

The decision to accept or reject the committee's vote moved to Provost Cole's desk. Before Provost Cole made his decision though, he contacted Ronald Breslow, a member of the Columbia Chemistry Department, for his insights. Breslow stated bluntly that, measured by intellectual strength and scientific ability, Weinstock was not in the same league as other tenured members of the Barnard Chemistry Department.

Provost Cole also discussed Weinstock's candidacy with the Chair of the Columbia Chemistry Department, Richard Bersohn. From these inquiries, as well as from a previous inquiry of Bersohn by Associate Provost Stephen Rittenberg, Cole learned that: (1) the general sentiment of the Columbia Chemistry Department was that Weinstock's work was unimaginative and that her publication record was weak; (2) the Columbia Department did not deem her worthy of tenure; but (3) the Columbia Department had voted to recommend her for tenure as a *courtesy* to their counterpart department at Barnard.

Provost Cole eventually recommended against tenure for Weinstock because he felt that her scholarship was not up to snuff.

The President of Columbia, Michael Sovern, who followed provostal recommendations on tenure as a matter of course, accepted Cole's recommendation and denied Weinstock tenure.

Weinstock learned in May 1993 that she had been denied tenure. Dean McCaughey from Barnard immediately objected to alleged procedural flaws in the tenure process, and requested that Provost Cole either reverse his decision and follow the *ad hoc* committee's recommendation to grant tenure, or reconvene the *ad hoc* committee to consider the additional inputs that Provost Cole had gathered from Professors Breslow and Bersohn. Dean McCaughey apparently was disturbed that the committee did not have the benefit of the information – damning as it was – that Provost Cole had collected from Breslow and Bersohn. Provost Cole though, refused to change his recommendation or to reconvene the committee.

Under the rules of the tenure process for Barnard candidates, if the Provost does not accept the vote of the *ad hoc* committee, he must say why. Provost Cole did this only after Professor Braine wrote two letters requesting such a clarification. In his explanation, Provost Cole stated that: (1) a favorable vote of 3-2 was not a strong endorsement; (2) the two Columbia members of the committee, Tall and Silverstein, felt that Weinstock's research was limited and below the quality expected of a candidate for tenure; (3) candidates from Columbia and Barnard were to be judged for tenure by the same standards; (4) Cohn, the outside member of the *ad hoc* committee (Rockefeller University), had stated that Weinstock would not receive tenure at a research university such as Columbia even though he conceded that her research was adequate for an institution such as Barnard; and (5) he had collected

evaluations from Breslow and Bersohn confirming his assessment that Weinstock did not merit tenure.

Citing procedural irregularities in Weinstock's tenure process, Barnard President Futter urged President Sovern to reject Provost Cole's recommendation and to accept the favorable recommendation of the *ad hoc* committee. In the alternative, President Futter requested that a new *ad hoc* committee be appointed to review Weinstock's application.

By this time, George Rupp had replaced Sovern as President of Columbia. In response to President Futter's protest, President Rupp wrote a letter informing President Futter that he had reviewed Weinstock's case and that he agreed with Provost Cole's determination that her research was not up to the standards expected of a tenured faculty member. President Rupp also indicated that he did not believe there were any procedural irregularities in Weinstock's tenure process. Accordingly, Rupp declined to interfere.

In February 1995, Weinstock filed a complaint in the United States District Court for the Southern District of New York (Keenan, *J.*), alleging that, by denying her tenure on the basis of her sex, Columbia violated: (1) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*; (2) Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681 *et seq.*; (3) the New York State Human Rights Law, New York Executive Law § 296 *et seq.*; and (4) the Administrative Code of the City of New York § 8-107 *et seq.*

Upon completion of discovery, Columbia filed a motion for summary judgment. The district court granted the motion, concluding that Weinstock had failed to produce any evidence to establish a triable issue of fact as to the

pretextual nature of Columbia's legitimate, non-discriminatory reason for denying her tenure. Weinstock now appeals.

DISCUSSION

We review a district court's grant of summary judgment *de novo*. *See Bedoya,* 91 F.3d at 351.

I. *Summary Judgment Standards*

Summary judgment as a tool for clearing the calendar of doomed lawsuits finds its modern origins in nineteenth century English practice. *See* John A. Bauman, *The Evolution of the Summary Judgment Procedure,* 31 Ind. L.J. 329 (1956). When the procedure migrated to this country, it was vastly expanded – England had limited it largely to actions on negotiable instruments (*see* Gregory A. Gordillo, *Summary Judgment and Problems in Applying the Celotex Trilogy Standard,* 42 Clev. St. L.Rev. 263 (1994)) – and applied to almost all civil cases. In federal practice it was vigorously championed by Yale Law Professor (and later a member of this Court) Charles Clark, who spearheaded the drive to include Rule 56 in the 1938 version of the Federal Rules of Civil Procedure.

In state practice, the great acolyte of summary judgment was Bernard Shientag of the New York State Supreme Court. As he wrote in *Pross v. Foundation Properties,* 158 Misc. 304, 285 N.Y.S. 796, 800 (Sup.Ct.1935):

> Why should [the defendant] be harassed and inconvenienced and perhaps damaged in his business and credit if it clearly appears that the

> plaintiff can entertain no hope of success? True, the defendant will prevail at the trial, but he will have been subjected to considerable expense by way of attorneys' fees and preparation for trial, for which, under our present system, he will not be compensated by the costs imposed. What better way is there for doing away with the multiplicity of unfounded and worthless suits with which our calendars are clogged?

Summary judgment is now appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When viewing the evidence, the court must "assess the record in the light most favorable to the non-movant and . . . draw all reasonable inferences in [the non-movant's] favor." *Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 177 (2d Cir.1990).

Although the moving party bears the initial burden of establishing that there are no genuine issues of material fact, once such a showing is made, the non-movant must "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256, 106 S.Ct. 2505. When the motion is made, we go beyond the paper allegations of the pleadings, which were enough to survive the common law demurrer. The time has come, as James and Hazard put it, "to put up or shut up." Fleming James, Jr. & Geoffrey C. Hazard, Jr., *Civil Procedure* 150 (2d

ed.1977). Accordingly, unsupported allegations do not create a material issue of fact. *See Goenaga v. March of Dimes Birth Defects Found.,* 51 F.3d 14, 18 (2d Cir.1995); *see also Bryant v. Maffucci,* 923 F.2d 979, 982 (2d Cir.1991).

Summary judgment is appropriate even in discrimination cases, for, as this Court noted, "the salutary purposes of summary judgment – avoiding protracted, expensive and harassing trials – apply no less to discrimination cases than to . . . other areas of litigation." *Meiri v. Dacon,* 759 F.2d 989, 998 (2d Cir.1985). Just a few short years ago we went out of our way to remind district courts that the "impression that summary judgment is unavailable to defendants in discrimination cases is unsupportable." *McLee v. Chrysler Corp.,* 38 F.3d 67, 68 (2d Cir.1994); *see also Shumway v. United Parcel Serv., Inc.,* 118 F.3d 60 (2d Cir.1997) (upholding grant of summary judgment for defendant in Title VII sex discrimination case). The Supreme Court has also recently reiterated that trial courts should not "'treat discrimination differently from other ultimate questions of fact.'" *Reeves v. Sanderson Plumbing Prods., Inc.,* ___ U.S. ___, ___, 120 S.Ct. 2097, 2109, 147 L.Ed.2d 105 (2000) (quoting *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 524, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)).

II. *Columbia's Motion for Summary Judgment*

Weinstock contends that the district court erred by holding that she failed to establish a deprivation of her rights under Title VII, and by concluding that there were no triable issues of fact with respect to the pretextual nature of Columbia's legitimate, non-discriminatory reason for denying her

tenure. Columbia counters that Weinstock has not produced any evidence to support her sex discrimination claim, and that the district court properly dismissed her case.

A. *The Title VII Scrutiny*

Title VII makes it unlawful "for an employer . . . to fail to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

In a Title VII sex discrimination case such as this, where there is no direct or overt evidence of discriminatory conduct, we apply the three-part burden shifting framework of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), to determine whether summary judgment is appropriate. *See Fisher v. Vassar College,* 114 F.3d 1332, 1335-36 (2d Cir.1997) (*en banc*).[1]

First, the plaintiff must establish a *prima facie* case of discrimination by showing that: (1) she is a member of a protected class; (2) she is qualified for her position; (3) she

[1] The identical standards apply to employment discrimination claims brought under Title VII, Title IX, New York Executive Law § 296, and the Administrative Code of the City of New York. *See Torres v. Pisano,* 116 F.3d 625, 629 n. 1 (2d Cir.1997); *Murray v. New York Univ. College of Dentistry,* 57 F.3d 243, 248 (2d Cir.1995); *Reed v. A.W. Lawrence & Co.,* 95 F.3d 1170, 1177 (2d Cir.1996); *Jalal v. Columbia Univ.,* 4 F.Supp.2d 224, 232 n. 10 (S.D.N.Y.1998).

suffered an adverse employment action; and (4) the circumstances give rise to an inference of discrimination. *See McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. 1817. Here, the district court, viewing the facts in the light most favorable to Weinstock, found that she satisfied her *de minimis* burden of proof at the *prima facie* stage.

That is not the end of the story, however. Even if the plaintiff succeeds in presenting a *prima facie* case, the defendant may rebut that showing by articulating a legitimate, non-discriminatory reason for the employment action. *See Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *Shumway,* 118 F.3d at 63. Upon the defendant's articulation of such a non-discriminatory reason for the employment action, the presumption of discrimination arising with the establishment of the *prima facie* case drops from the picture. *See St. Mary's,* 509 U.S. at 510-11, 113 S.Ct. 2742; *Fisher,* 114 F.3d at 1336. For the case to continue, the plaintiff must then come forward with evidence that the defendant's proffered, non-discriminatory reason is a mere pretext for actual discrimination. The plaintiff must "produce not simply 'some' evidence, but 'sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proffered by the [defendant] were false, and that more likely than not [discrimination] was the real reason for the [employment action].'" *Van Zant v. KLM Royal Dutch Airlines,* 80 F.3d 708, 714 (2d Cir.1996) (quoting *Woroski v. Nashua Corp.,* 31 F.3d 105, 110 (2d Cir.1994)). In short, the question becomes whether the evidence, taken as a whole, supports a sufficient rational inference of discrimination. To get to the jury, "[i]t is not enough . . . to disbelieve the employer; the factfinder must [also] believe the plaintiff's explanation of intentional

discrimination." *St. Mary's,* 509 U.S. at 519, 113 S.Ct. 2742.[2]

Applying these standards here, the district court held that Columbia had articulated a legitimate reason for its tenure decision – namely, that Weinstock's scholarship was not up to its standards. The district court also found that Weinstock had failed to come up with any evidence that this reason was a pretext. We find no error in the district court's analysis.

1. *Columbia's legitimate, non-discriminatory reason for denying Weinstock tenure*

Columbia's legitimate, non-discriminatory reason for denying Weinstock tenure was that she did not meet the standard for scholarship uniformly applicable within the University. There can be no doubt that this was a valid reason for her tenure decision.

When a college or university denies tenure for a valid, non-discriminatory reason, and there is no evidence of discriminatory intent, this Court will not second-guess that decision. *See Bickerstaff v. Vassar College,* 196 F.3d 435, 455-56 (2d Cir.1999); *Fisher,* 114 F.3d at 1344-45.

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[2] The Supreme Court recently reaffirmed this framework in *Reeves,* ___ U.S. at ___, 120 S.Ct. at 2108. We decline to tarry on the question of how much evidence is necessary to find pretext for the simple reason that, as the district court held, Weinstock "has not produced any evidence to support a finding that a triable issue of fact exists with respect to the pretextual nature of [Columbia's] stated legitimate, non-discriminatory reason for . . . denying tenure."

Indeed, in *Bickerstaff,* this Court recently upheld a grant of summary judgment to Vassar College, dismissing a Title VII sex discrimination claim, because the district court correctly determined that the tenure candidate "did not satisfy the posted criteria for promotion." 196 F.3d at 444.

Here, *ad hoc* committee members Tall and Silverstein testified in their depositions that they believed that Weinstock's publications and research papers were insufficient to merit tenure. They also testified that her research lacked originality and that the journals in which she published were not first-tier scientific journals. Neither Tall nor Silverstein was impressed with Weinstock's letters of recommendation. Silverstein noted that the letters were lukewarm by comparison to other letters he had examined in other tenure reviews.

Even though the *ad hoc* committee voted 3-2 to grant Weinstock tenure Provost Cole recommended against tenure because her scholarship was questionable. Rejecting a committee vote was nothing new, however, because, according to Columbia's current President George Rupp, a 3-2 favorable vote is considered "underwhelming in terms of support," and from 1989 to the present, as earlier noted, at least six tenure candidates (five male, one female) were denied tenure after an *ad hoc* committee voted 3-2 in favor of granting tenure.

Before Provost Cole made his recommendation to disagree with the 3-2 vote, he contacted Ronald Breslow, a member of the Columbia Chemistry Department for further comment. It should come as no surprise that Cole, who is not a biochemist, did not read Weinstock's publications during the decision-making process, but instead

relied upon the input of other professors who had a better grasp of her work. Breslow stated that Weinstock was not in the same class as other tenured members of the Barnard Chemistry Department in terms of intellectual strength or scientific ability. Provost Cole also discussed Weinstock's candidacy with the Chair of the Columbia Chemistry Department, Richard Bersohn. From these inquiries, as well as from a previous inquiry of Bersohn by Associate Provost Rittenberg, Cole learned that: (1) the general sentiment of the Columbia Chemistry Department was that Weinstock's work was unimaginative and that her publication record was weak; (2) the Columbia Department did not deem her worthy of tenure; but (3) the Columbia Department had voted to recommend her for tenure as a courtesy to their counterpart department at Barnard.

We conclude that when Provost Cole recommended to the President of Columbia that Weinstock's tenure be denied, the legitimate, non-discriminatory reason that she was not academically qualified was established.

2. *Pretext*

Weinstock contends, however, that this was all a mere cover for discrimination, because there exists evidence of: (1) gender stereotyping; (2) procedural irregularities in the *ad hoc* committee process; and (3) disparate treatment. We look at each of these claims in turn.

a. *Gender stereotyping*

Weinstock contends that during the *ad hoc* committee meeting, she was referred to in a patronizing tone and that statements were made that stereotyped her and

demonstrated gender bias. Specifically, Weinstock claims that committee members Tall and Silverstein referred to her as "nice" and "nurturing," and that these statements are essentially code words for gender bias because they reflect feminine stereotypes. Weinstock argues that this is evidence of pretext. We disagree.

First, there appears to be no admissible evidence to support Weinstock's allegation that anyone on the committee referred to her as "nurturing." Weinstock claims that she *heard* from Chapman that the word "nurturing" was used. However, in Chapman's deposition, in which Weinstock's attorney took part, Chapman never stated that the word "nurturing" was used. Weinstock claims that Hertz, too, *told* her the word "nurturing" was used. However, when Hertz was deposed by Weinstock's attorney, Hertz stated, "I don't remember them using the word 'nurturing. . . .'" Silverstein, in his deposition, also stated that he did not remember the word "nurturing" being used. Tall, as well, stated that he did not remember the word "nurturing."

Weinstock has failed to offer any direct evidence, or any testimony, from any person present at the committee meeting, that the word "nurturing" was used during her tenure process. Hertz denies it; Silverstein does not remember it; and Chapman, when deposed, was never even queried on the matter. Therefore, because Rule 56 of the Federal Rules of Civil Procedure provides that an affidavit submitted in opposition to summary judgment "shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence," Fed.R.Civ.P. 56(e), Weinstock has adduced no evidence sufficient to create a genuine issue of fact as to her contention that the word "nurturing" was used. *See Sarno v.*

Douglas Elliman-Gibbons & Ives, Inc., 183 F.3d 155, 160 (2d Cir.1999).

Second, even assuming that the words "nice" and "nurturing" were used, this fact alone provides no evidence of pretext or discriminatory intent on the part of Columbia. "Nice" and "nurturing" are simply not qualities that are stereotypically female.

Any reasonable person of either sex would like to be considered "nice." It is indefensible to conclude that an employer's use of the word "nice" evinces gender discrimination. Were it so, every time an employer said, "[Bob or Sue], you are a nice person and a hard worker, but I am going to have to let you go," such a statement would become a basis for a Title VII discrimination claim.

This is not a case like *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), where the Supreme Court held that Title VII was violated when Ann Hopkins was denied a promotion because she was perceived negatively for lacking stereotypical feminine character traits. Specifically, her superior had advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Price Waterhouse,* 490 U.S. at 235, 109 S.Ct. 1775. These statements were a clear indication that Hopkins' superiors had discriminated against her on the basis of sex, because she did not fit the sexual stereotype of what a woman should be. Weinstock, on the other hand, faced no such carping.

Nor can "nurturing" possibly be the basis for a Title VII action. The two primary definitions of the verb "nurture" are "to supply with food, nourishment, and protection" and "to train by or as if by instruction." *Webster's*

Third International Dictionary (1961). These are definitions that are in no way stereotypically female.

Finally, there is no evidence that these words were ever used to describe Weinstock's quotidian research, which was the proffered non-discriminatory reason for Columbia's decision to deny her tenure. These words, if used at all, were spoken only in connection with Weinstock's teaching, *i.e.*, her classroom performance. It is simply not objectively reasonable to label these innocuous words as semaphores for discrimination. To do so would preclude tenure committees from ever discussing a candidate's positive personal attributes as a teacher. Niceness and nurturing are not, after all, bad qualities to have in a teacher's mentoring capacity – particularly of undergraduates.

b. *Procedural irregularities*

Weinstock contends that there was a series of procedural irregularities in her tenure process that evidences discriminatory intent on Columbia's part. Specifically, Weinstock takes issue with Tall's phone calls to the committee members before the committee convened, and Provost Cole's delay in explaining why he rejected the committee's vote and recommended denial of Weinstock's tenure. There is, however, no evidence that Weinstock's sex played a role in any alleged procedural irregularities, and there is, again, no evidence of pretext.

It is true that "'[d]epartures from procedural regularity . . . *can* raise a question as to the good faith of the process where the departure may reasonably affect the decision.'" *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305, 313 (2d Cir.1997) (emphasis added) (quoting *Zahorik*

v. Cornell Univ., 729 F.2d 85, 93 (2d Cir.1984)). In this case, however, whatever irregularities existed did not affect the final decision to deny Weinstock tenure. The phone calls that Tall made prior to the committee meeting had no effect on any committee member's assessment of Weinstock's candidacy for tenure. In deposition testimony, the committee members acknowledged as much. Moreover, the committee voted 3-2 in favor of granting her tenure. Provost Cole made his decision to reject the committee's recommendation; and his delay in explaining his recommendation did not affect that decision itself. Therefore, any possible procedural irregularities in the denial of Weinstock's tenure were not enough to suggest gender bias.

Furthermore, the dissent incorrectly concludes that "procedural defects in the tenure review process[ ] call[ ] into question Columbia's proffered nondiscriminatory reason for denying tenure." The phone calls that the dissent characterizes as a "procedural irregularity," in fact, only serve to support Columbia's proffered nondiscriminatory reason for denying Weinstock tenure. The deposition testimony of Professors Hertz, Silverstein, Braine, and Tall all support the conclusion that Professor Tall indicated from the very beginning that he had concerns about the quality of Weinstock's research and that he was concerned that the materials in her dossier were not of "tenurable" quality. The consistency of the viewpoint expressed by Tall – that Weinstock's research was subpar – only further supports Columbia's proffered nondiscriminatory reason for denying Weinstock tenure.

c. *Disparate treatment*

Weinstock also alleges that she was held to a stricter standard for tenure because she is a woman, and argues that this is evidence of discriminatory intent on Columbia's part. Specifically, she contends that Barnard professors are traditionally held to a lesser scholastic standard than Columbia professors, and complains that she was not cut this slack during her candidacy. The evidence, however, is to the contrary.

According to Columbia, the standard for *quality* of research that is expected of tenure candidates from Barnard and Columbia is identical, although a lower level of *productivity* in research and publication is accepted from Barnard candidates because they typically have a heavier teaching load. Any difference in productivity standards, however, is of no import, because Columbia's nondiscriminatory reason for denying Weinstock tenure involved the quality, not the quantity, of her research. That the quality of research for both Columbia and Barnard professors must be uniform is undisputed by Presidents Rupp, Sovern and Futter.

Weinstock disagrees. She asserts that Columbia applied a stricter standard to her than to male Barnard candidates in the hard sciences; she believes she was measured by the "higher" standard for tenure required of a Columbia-based candidate. Weinstock's only support for this assertion is her contention that a year after she was denied tenure, Columbia granted tenure to a male Barnard faculty member in its Physics Department, Timothy Halpin-Healy, whose research was supposedly *below* the standard that would be expected by his counterpart department at Columbia.

Initially, Weinstock fails to support her claim that a different standard was used during the two tenure hearings in question. Provost Cole's notes unmistakably indicate that at both hearings the committee discussed whether the candidate would receive tenure at Columbia. Additionally, Weinstock's only evidence that Halpin-Healy's research was subpar in this regard was the fact that one unidentified member of his *ad hoc* committee may have expressed the opinion that his research was not up to Columbia University standards. However, there is no other evidence that any other member of his *ad hoc* committee shared this view, and in fact, the committee voted unanimously to grant Halpin-Healy tenure. It cannot be said therefore that Halpin-Healy was held to a laxer standard than Weinstock when he was granted tenure.

The dissent contends that certain statistical evidence, culled from an amicus brief and never presented to the district court or on appeal, is probative of sex discrimination. Specifically it argues that raw data purportedly describing a pattern of under-representation and unequal opportunity for women faculty at Columbia leads to the conclusion that gender discrimination is in play here. This, however, is little but an unsupported hypothesis providing no foundation for the assertion that there was discrimination in *Weinstock's* tenure process. *See Zahorik,* 729 F.2d at 95; *Pollis v. New School for Social Research,* 132 F.3d 115, 123 (2d Cir.1997). The "statistical evidence" is also simply not part of the record, and is therefore material that

cannot be considered in deciding this case.[3] *See International Business Machines Corp. v. Edelstein,* 526 F.2d 37, 45 (2d Cir.1975) (*per curiam*).

Columbia had a legitimate, non-discriminatory reason for denying Weinstock tenure – she lacked the requisite scholarship required. A claim that a single, supposedly less qualified male received tenure in the hard sciences at Barnard does not signify sex bias because "the record at best indicates a difference of opinion in evaluation of scholarly merit," and not gender discrimination aimed at Weinstock. *Zahorik,* 729 F.2d at 94.

B. *The Dissent's Assertions*

Trolling for an issue of fact, the dissent marshals twelve supposed "disputed issues of fact," and claims that their existence suggests pretext and should have given Weinstock "her day in court."

The first "issue" found by the dissent involves the phone calls made by committee Chair Tall to the *ad hoc* committee before it met to discuss Weinstock's tenure candidacy. The dissent contends that the fact that these calls were made at all "calls into question Columbia's proffered nondiscriminatory reason for denying Weinstock

[3] The dissent also states that a Columbia professor has characterized the University's record in tenuring women as a "scandal." This is a distortion. The professor actually stated that Columbia had two tenured women in its Chemistry Department, that this was a "good" record in comparison to other research institutions, and that the overall picture was a "scandal." If anything, this is a backhanded compliment, because the professor also stated that Columbia was "somewhat better" at tenuring women than other universities.

tenure." However, as previously noted, it is standard operating procedure for a committee Chair to call members of an *ad hoc* committee to see if they need anything before the committee meets. Granted, it would be inappropriate to criticize a candidate in this type of phone call; but whether Tall criticized Weinstock is immaterial because no *ad hoc* committee member testified that Tall's comments in any way influenced their view or eventual vote. In any event, given that the dissent focuses on the alleged bias of Provost Cole, the primary decisionmaker, the fact that Professor Tall may have made inappropriate phone calls is all the more immaterial.

In an effort to tar *ad hoc* committee members Tall and Silverstein as biased, the dissent reaches for an article in the *Yale Journal of Law and Feminism,* again provided by amici. The dissent claims that Tall's and Silverstein's reference to Weinstock by her first name, "Shelley," is evidence of gender bias. The dissent notes that the Yale article found that in 1,730 student evaluations of law school faculty, male professors were never referred to by their first names. However, the Yale article does *not* at all discuss tenure hearings of either female or male professors or comments made by faculty, and is therefore irrelevant to this case. *See* Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy,* 8 Yale J.L. & Feminism 333, 339-40 (1996).

The second and third "issues" noted by the dissent involve the standards that must be met for a professor to earn tenure at Columbia. The dissent claims that Provost Cole "took an active role and expressed a negative view of Weinstock." However, at the *ad hoc* committee meeting, Cole's central message was that the standards for any tenure candidate, whether from Barnard or Columbia, are

"University-wide." Even the President of Barnard embraces this standard.

Cole's constant reiteration that "the criteria and standards of judgment for all tenure nominations in the University are the same" could conceivably be seen as negative in light of Weinstock's subpar scholarship. However, his charge to the committee on these standards was a correct representation of University policy, and cannot reasonably be viewed as evidence of discrimination, because it is not this Court's role to secondguess the application of that policy to Weinstock. After all, "[Columbia] alone has the right to set its own criteria for promotion and then to evaluate a candidate's fitness for promotion under them." *Bickerstaff,* 196 F.3d at 455-56 (citing *Lieberman v. Gant,* 630 F.2d 60, 67 (2d Cir.1980) (Friendly, *J.*) ("A university's prerogative 'to determine for itself on academic grounds who may teach' is an important part of our long tradition of academic freedom.") (quotation omitted)). Instead, this Court's "role is narrowly limited to determining whether an illegitimate discriminatory reason played a motivating role in the employment decision." *Bickerstaff,* 196 F.3d at 456. Because we conclude that discrimination played no such role here, we decline to join the "Super-Tenure Review Committee[ ]" apparently envisioned by our dissenting colleague. *Pollis,* 132 F.3d at 123 n. 5 (cautioning that Congress did not intend, in making Title VII applicable to educational institutions, for courts to sit as "Super-Tenure Review Committees") (quoting *Gant,* 630 F.2d at 67 (Friendly, *J.*)).

The fourth "issue" that the dissent marshals as evidence of gender discrimination is captious. It criticizes Provost Cole for an error he made in his initial letter to Barnard College when he stated that he agreed with the

ad hoc committee's vote to deny Weinstock tenure. The committee had actually voted 3-2 in favor of tenure; and Cole, of course, did not agree with the committee. He corrected his letter immediately. This mistake, however, is immaterial, and hardly supports a conclusion that Cole's decisionmaking was tainted by gender discrimination.

The dissent next assails Provost Cole's character, actually calling him "mendacious." The basis for this alleged mendacity is the fact that Cole sought further information on Weinstock's scholarship from Professors Bersohn and Breslow of the Columbia Chemistry Department. The dissent, in a statement reminiscent of a spy thriller, claims that Cole "obtained from Professor Breslow what he wanted." There is no record evidence stating what Cole "wanted;" and the fact that he sought additional input on Weinstock's scholarship is nothing out of the ordinary, especially given the broad powers that a Provost has during tenure decisions at Columbia. Professor Breslow *was* blunt in his assessment of Weinstock, stating that, in terms of intellectual strength and scientific ability, she was not in the same league as other tenured members of the Barnard Chemistry Department. However, the fact that this statement was deleterious to Weinstock does not make it what Cole "wanted," and it certainly does not prove him to be "mendacious."

The sixth "issue" the dissent raises is a contention that in his personal notes Provost Cole paid little heed to Weinstock's research or scholarship, but was instead concerned primarily with her personal characteristics, thereby exhibiting his inherent gender bias. This is just wrong. The record shows that Cole's notes solidly address Weinstock's scholarship. They are as follows:

(1) Lessinger & Chapman – quality – not up to quality level of either of the two current members of the Chemistry Dept.

(2) Nobody in terms of intellectual power; work in periphery of the field

(3) Wouldn't make it at City College – probably wouldn't make tenure at City College

(4) Never had anything sensible to say at colloquium; other[s] from Barnard are raising interesting questions

(5) Ph.D. defenses – nothing; a "push-over" – not impressive

(6) perfectly nice person.

In the seventh "issue" cited by the dissent, it is alleged that Provost Cole was off base when he inquired into the sincerity of the Columbia Chemistry Department's favorable recommendation. The dissent states that Cole failed to follow "formalized procedure," and that this is evidence of discrimination. The trouble with this argument is that there is no "formalized procedure" forbidding Cole to engage in such an inquiry. Cole had learned from Professors Bersohn and Breslow that the vote of the Columbia Chemistry Department was a mere "courtesy," and Cole took that into account when making his final tenure decision. Given that there were four abstentions in the department vote (a rare occurrence), it is not hard to conclude that the positive votes may well indeed have been a "courtesy." It was certainly not a sign of discrimination when Cole chose to so interpret it.

The eighth "issue" is difficult to comprehend. The dissent claims that, as a matter of logic, Provost Cole's

statement that he based his tenure decision partly upon the poor assessments of Weinstock's scholarship by Professors Bersohn and Breslow makes no sense. This is because Professors Bersohn and Breslow, as members of the Columbia Chemistry Department, would have had to have either abstained or voted in favor of recommending tenure for Weinstock, since the Department vote contained no negative votes. The dissent therefore concludes that Bersohn and Breslow could not have been against granting Weinstock tenure. This mind game certainly does not generate a material question of fact. In any event, we have already noted that Professor Breslow stated bluntly that he thought Weinstock was not in the same league as other tenure members of the Barnard Chemistry Department. That statement alone is enough to support Provost Cole's conclusion that Professor Breslow had a negative view of Weinstock's scholarship.

The ninth "issue" finds an inconsistency between Professor Cohn's view of Weinstock and Provost Cole's characterization of that view. After Weinstock was denied tenure, Cohn, a member of the *ad hoc* committee who had voted for tenure, wrote that he "was strongly swayed by her excellence as a teacher and mentor" and that he "was less disturbed about [her research] which [he] found rather imaginative." Cole, in a letter to Columbia's President explaining why he decided not to grant Weinstock tenure, stated that Professor Cohn thought her research was "weak." However, because Columbia's decision was based on Weinstock's research, which Cohn indicated was *not* the primary basis for his "yes" vote, the fact that Cole may have misconstrued Cohn's view of Weinstock's research is inconsequential.

"Issue" ten focuses on Provost Cole's delay in writing a letter to delineate the reasons for his decision to reject the 3-2 recommendation of the *ad hoc* committee. After being prodded by *ad hoc* committee member Professor Lila Braine, Cole sent a letter explaining his reasons, and in it stated that his explanation "would be prepared within the context of our defense of the University." This defensive statement was understandable. Weinstock had already filed a charge of discrimination with the EEOC when Cole wrote his letter. The dissent interprets Cole's statement as evidence of pretext, but his letter of explanation amounts to nothing but a reiteration of the fact that Weinstock was denied tenure because her research was not up to snuff.

In its "issue" eleven, the dissent contends that the tenure standards for a male Barnard professor, Timothy Halpern-Healy, were lowered, and that Weinstock, because she was a woman, did not receive the same treatment. There is no basis for this assertion in the record. The dissent claims that "a male professor at the Physics Department was granted tenure at Barnard despite the fact that one member of his *ad hoc* committee *acknowledged* that he would not have received tenure in the Physics Department at Columbia." His *ad hoc* committee, as a whole however, did no such thing. The most that can be said is that *one member* of that committee stated that Halpern-Healy would be in the bottom ranks of Columbia's Physics Department. There is no evidence that the entire committee "acknowledged" that Halpern-Healy would not receive tenure at Columbia.

The final "issue" noted by the dissent concerns an assertion that Provost Cole disingenuously informed Professor Braine, a member of the *ad hoc* committee, that part of the reason Weinstock was denied tenure was

because of the financial impact of tenure on University finances. There is, however, no basis in the record for this assertion. The only letter to Braine from Cole clearly states that Weinstock was denied tenure because her research was subpar. Moreover, even assuming finances played a role in the denial of Weinstock's tenure, such a consideration would be entirely immaterial to this case. Title VII was enacted to combat *discrimination;* it was not designed to conscript courts into the task of reviewing the wisdom of university administrators' fiscal decisions. *See Bickerstaff,* 196 F.3d at 456 (citing cases).

* * *

Notwithstanding the dissent's quixotic efforts to breathe life into this case, we cannot fault the district court for aborting it by granting a motion for summary judgment. The very purpose of summary judgment is to weed out those cases that are destined to be dismissed on a motion for a directed verdict, or as it is now termed, a motion for judgment as a matter of law. *See* Fed.R.Civ.P. 50(a). Plaintiff would have us follow the advice of David Copperfield's mentor, the amicable Mr. Micawber, and let matters proceed in the hope that "something will turn up." This notion is inconsistent with the text and policy behind Rule 56 of the Federal Rules of Civil Procedure, which was intended to prevent such calendar profligacy.

Weinstock has failed to produce "'sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proffered by the [defendant] were false, and that more likely than not [discrimination] was the real reason for the [employment action].'" *Van Zant,* 80 F.3d at 714; *see also Reeves,* ___ U.S. at ___-___, 120 S.Ct. at 2108-09. For this and the foregoing reasons, the district

court correctly granted Columbia's motion for summary judgment and dismissed Weinstock's complaint. Hope alone cannot raise a triable issue.

CONCLUSION

We have considered the appellant's remaining contentions and find them to be without merit. Accordingly, we AFFIRM the grant of appellee's motion for summary judgment.

CARDAMONE, Circuit Judge, Dissenting:

After learning in May 1993 that she had been denied tenure at Barnard College where she had taught as an assistant professor in the Chemistry Department for eight years, plaintiff Shelley Weinstock filed a Title VII complaint against defendant Columbia University asserting that the denial of tenure discriminated against her on account of her sex. From the district court's grant of summary judgment in favor of Columbia dismissing her complaint, plaintiff appeals. The majority has voted to affirm the judgment of the district court. Respectfully, I dissent and vote to reverse the grant of summary judgment. I would permit the case to go to trial so that plaintiff might have her day in court on the merits of her discrimination claim.

The district court ruled that plaintiff made out a *prima facie* case. That is, as a woman she is a member of a protected class; she is qualified to be a tenured professor; she suffered an adverse employment decision in the denial of tenure; and the circumstances surrounding that denial give rise to an inference of discrimination. The majority

accepts the district court's ruling that a *prima facie* case has been stated.

After plaintiff has made out a *prima facie* case the defendant is required to articulate a legitimate, non-discriminatory reason for denying tenure. Here that reason was that plaintiff's scholarship allegedly was not up to defendant's standards. Plaintiff's burden at that point is to come forward with proof that such reason is merely a pretext, and that more likely than not gender discrimination was the real reason.

The district court found that plaintiff failed to come forward with any proof of pretext. The majority could find no error in this conclusion. I think there was error. To avoid dismissal of her civil rights complaint plaintiff need not actually establish pretext. Her burden is only to raise a question of fact as to the validity of the reason proffered by defendant for its adverse employment decision. In this dissent, I hope to demonstrate that this record abundantly reveals material questions of fact regarding both pretext and whether defendant's decision resulted from sex discrimination.

Professor Weinstock, a woman science professor in a field dominated by men, was turned down for tenure at Barnard College by defendant Columbia University, acting through its provost in whom it vested vast discretion in tenure matters. From the start the provost had a negative view of Weinstock's candidacy. He took actions that violated both the letter and the spirit of Columbia's affiliation agreement with Barnard – an agreement executed to ensure fairness to Barnard in tenure matters. Despite the unanimous support for tenure of those most familiar with

Weinstock's scholarship, namely her peers in the Chemistry Departments of Columbia and Barnard, the provost, who had no expertise in the field and had not read any of her publications, single-handedly denied her tenure, stating that, in his view, her scholarship was not up to Columbia's standards. From this it is fair to say that the provost evaluated plaintiff's candidacy for tenure through a gender-tainted lens, failing to recognize that his vast discretion did not permit him to violate the affiliation agreement, or to trample on the law forbidding discrimination on account of sex that Congress in 1964 enacted as Title VII of the Civil Rights Act. In particular, this record is marked by numerous contradictions and irregularities in the conduct of and rationales offered by Provost Jonathan Cole, the principal actor in this tenure decision. These inconsistencies are inexplicable in the absence of gender discrimination.

I BACKGROUND

A. *Relationship Between Columbia and Barnard*

To fully explain the grounds on which I dissent, it is important to understand the relationship between Barnard, the college where Professor Weinstock sought tenure, and defendant Columbia University.

Barnard College and Columbia University are parties to a written affiliation agreement that requires Columbia's approval of tenure for Barnard faculty. The agreement requires that Barnard appoint faculty of comparable quality to Columbia and that there be a regular system for reviewing Barnard candidates for tenure. Yet, the University agrees that the procedures for Barnard candidates are not identical to those for Columbia candidates, and that

this distinction is to ensure fairness to Barnard. Although the tenure review process embodies the same standards and provides for regular review, it recognizes the differences in the mission between Barnard College and Columbia University.

Barnard is a small, undergraduate, women's liberal arts college of several thousand students (this year's graduating class was about 570), while Columbia is a large, internationally known research university, teaching graduate as well as undergraduate students. Resources for research at the smaller College are more limited than at the University, which is a reason why "the procedures by which Barnard nominations [for tenure] are reviewed differ in some respects" under the agreement between the University and Barnard. Because there are no graduate students to assist in research and the research budget and facilities are more limited than at the larger University, the projects undertaken by Barnard professors in the Chemistry Department are necessarily narrower than those at the University. Thus, although the affiliation agreement states that faculty at Barnard and Columbia are to be of comparable quality, the more limited resources at Barnard require that the standards for tenure at the two institutions differ. This crucial difference is explored below.

B. *Columbia's Record in "Natural Sciences" – Statistics*

Statistical evidence puts this matter in further perspective and makes plain how the University deviated from the standards it had agreed to abide by. Although not in the record before us, Columbia makes statistical information on its hiring patterns freely and widely available.

See Office of Equal Opportunity and Affirmative Action (visited Aug. 8, 2000) <http://www.columbia.edu/cu/vpaa/eoaa/index.html>. Even though Columbia established a 33 percent hiring goal for women in the natural sciences in 1996-97, of the five new hires that year, none were women. Such disparity cannot be explained by a lack of women graduate students in scientific fields since women earned 45 percent of all doctorates awarded in life sciences (which includes biochemistry, Weinstock's field) in 1997; nor can it be explained by a restricted pipeline of candidates since even in 1987 women obtained 35 percent of all life science doctorates nationwide.

In fact, in the natural sciences (often known as "hard sciences"), where plaintiff teaches, only 15 percent of professors at Columbia were women. In over forty years, only two women have ever been tenured in Columbia's Chemistry Department, and the department has never had more than one woman tenured at a time. Columbia's record cannot be explained by supply and demand – the number of women obtaining doctorates and entering the academic job market in science has risen dramatically over the last decade. One Columbia professor characterized this abysmal record as a "scandal." The 15 percent women professors in natural sciences has held steady for the past 12 years, the same length of time the provost who made this tenure decision has held office. Statistical disparities like these are probative on the issue of discrimination because they are often the only way to demonstrate covert discrimination. *See Hazelwood Sch. Dist. v. United States,* 433 U.S. 299, 307-08, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977).

C. *Plaintiff's Candidacy*

Next we look at plaintiff's background. Weinstock was an assistant professor in the Chemistry Department at Barnard for nine years from 1985 to 1994 when, after she was denied tenure, her employment was terminated. She is a biochemist whose research focused primarily on blood substitutes and artificial organs. Weinstock was educated at MIT and Harvard, published scholarly works in academic publications and received prestigious grants, including one from the National Institutes of Health, which funds less than 10 percent of all applications. Because the award of such a grant is highly selective it shows that she ranked near the top of her national peer group. In her tenure application, Weinstock received the unanimous support of the Barnard Chemistry Department. The Columbia Chemistry Department voted for plaintiff's tenure with not a single negative vote. The Barnard Committee for Tenure voted in her favor, and the president of Barnard favored granting plaintiff tenure. Weinstock's tenure dossier was extremely strong, containing excellent referee letters from leading scientists in her field. She was widely lauded as an excellent teacher and mentor.

II Provost Cole and the *Ad Hoc* Committee

A. *Cole's Conduct*

Following the approval of the Chemistry Departments of Barnard and Columbia and the other approvals already recited, Professor Weinstock's application was turned over to Columbia Provost Cole, who, as provided for in the affiliation agreement, selected an *ad hoc* committee of five: two from Columbia (Professors Tall and Silverstein), two

from Barnard (Professors Braine and Hertz), and one outside member having no affiliation with Barnard or Columbia (Professor Cohn of Rockefeller University). The *ad hoc* committee serves as an independent, objective body to evaluate tenure candidates.

The two Columbia professors Cole appointed to the *ad hoc,* Alan Tall and Samuel Silverstein, were both from the medical school. Cole had known both professors for several years and with Silverstein shared a common interest in the "sociology of science," an area in which Cole has published several books.

As Chair of the *ad hoc* committee, Cole's other Columbia appointee, Professor Tall, called each of the *ad hoc* members before the committee convened and expressed criticism of Weinstock's candidacy. Tall admitted he called to express "his concerns." The majority dismisses these phone calls as "protocol," yet testimony from Lila Braine and Paul Hertz, the two Barnard professors on the committee, makes it very clear that Tall was not calling to schedule a convenient meeting time, inquiring about information perhaps missing from the dossier distributed to all members in advance, or attending to any other matters falling within the scope of such administrative "protocol."

Indeed, Braine testified that Tall was trying to "twist her arm" with his negative views of Weinstock. Both Braine and Hertz were so disturbed by the nature of Tall's phone calls that independently of each other they reported the phone calls to Robert McCaughey, the Dean of Barnard's Arts and Sciences faculty, who was to be present at the *ad hoc.* Columbia's then-President Michael Sovern, its current President George Rupp, Barnard's then-President

Ellen Futter, and even Cole himself all agree that these phone calls would have been clearly "inappropriate" if Tall were expressing an opinion on Weinstock's candidacy, and would have constituted a procedural irregularity, because, according to Columbia's president, members of an *ad hoc* committee are to meet after reviewing the candidate's dossier "completely independently."

Yet when Dean McCaughey raised the issue at the *ad hoc* and requested that a new *ad hoc* be convened, Provost Cole dismissed his request, claiming that because neither Braine nor Hertz felt their opinions had changed as a result of Tall's phone calls, there was no procedural irregularity. Replicating Cole's argument, the majority finds that "whatever irregularities existed did not affect the final decision to deny Weinstock tenure." Whether Tall's arm-twisting was ultimately successful is irrelevant to the issue of gender discrimination. The very fact that the calls were made, that they were clearly inappropriate, and as such constituted procedural defects in the tenure review process, calls into question Columbia's proffered nondiscriminatory reason for denying Weinstock tenure. (issue # 1) This evidence raises the first of 12 disputed questions of fact that I identify. Many of them relate to Cole's credibility. All of them are material to the issues of pretext and discrimination. At this stage of the case, all of these issues should have been resolved in plaintiff's favor.

Moreover, at the *ad hoc* deliberations, evidence of gender discrimination began to surface. Barnard Professors Braine and Hertz observed that Columbia Professors Silverstein and Tall, who had never met Weinstock,

referred to her by her first name, "Shelley." Referring to a woman by her first name in this context may be probative on the issue of gender discrimination. Amici,[1] quoting an article from the *Yale Journal of Law and Feminism,* report that in 1,730 student evaluations of law school faculty, male professors were never referred to by their first names. Braine and Hertz also testified that Silverstein and Tall assumed a patronizing tone toward Weinstock, calling her "nice" and describing her as if she were nurturing. Although they do not specifically remember what words were used to describe Weinstock, they both believe that "nurturing" was consistent with the nature of Silverstein's and Tall's commentary.

The majority finds, as a matter of law, that these comments cannot possibly raise an inference of sex discrimination because "nice" and "nurturing" could: (1) conceivably be used to describe men, and (2) are positive qualities. Perhaps these are positive qualities in a motherhood contest, but during the tenure deliberations for a chemistry professor and scientist, they suggest gender discrimination. By describing her as "nice" and referring to her nurturing manner, Silverstein and Tall were not extolling her positive qualities – rather, they were using these qualities to highlight what they perceived to be her intellectual weakness.

At the *ad hoc* meeting the Barnard dean and Columbia provost are both present, supposedly as observers. But

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[1] A brief *Amici Curiae* was filed in this appeal jointly by Equal Rights Advocates, American Association of University Women, Association for Women in Science, and New York Chapter of the National Employment Lawyers Association.

the provost took an active role and expressed a negative view of Weinstock and her chemistry research, a field in which he had no expertise. Cole admitted he had not read a single one of her many publications. Significantly, he denied in his deposition having expressed any opinion at the *ad hoc* meeting at all, yet three members of the committee who were present, including outside Professor Cohn, say Cole took an active role and was negative (Professor Cohn said the "sticking point" for Cole was Professor Weinstock's research). (issue # 2)

The provost informed the members of the *ad hoc* committee that plaintiff should be judged as though she would receive tenure at Columbia, a standard that had not been applied to other Barnard candidates. According to the affiliation agreement between the two institutions, the procedures by which Barnard nominations for tenure are reviewed "differ in some respects" from Columbia nominations. The differences between the two institutions render the provost's purported standard a false and impossible one. (issue # 3)

Provost Cole's predisposition against Professor Weinstock, evidenced by his active and deliberate role during the *ad hoc,* could explain why remarkably he sent Barnard College a letter stating that he agreed with the *ad hoc*'s decision to *deny* Weinstock tenure and was thus denying her tenure. He generated this very important document despite the fact that the *ad hoc* committee had voted to *grant* plaintiff tenure. Alerted to his glaring error, Cole sent a follow-up letter to Barnard College, explaining that he had sought "additional information" after the *ad hoc* voted in her favor, which had convinced him to reject its recommendation. (issue # 4)

The process by which Provost Cole collected his purported "additional information" is equally mendacious. He asked Associate Provost Stephen Rittenberg to compile a list of experts in Weinstock's field to consult about her candidacy. Although Rittenberg provided him with a list of expert faculty within Columbia University, Cole did not contact a single person on this list. Rather, he turned to Breslow and Bersohn, two professors in Columbia's Chemistry Department, neither of whom are experts in Weinstock's field. Professor Breslow had previously written a thoughtful letter supporting plaintiff's candidacy, but changed his tune in response to the provost, describing Weinstock as not aggressive, not tough, a "perfectly nice person" and a "pushover." Having obtained from Professor Breslow what he wanted, the provost then cited Breslow's advice in support of his decision to turn plaintiff's tenure application down. (issue # 5)

When questioned during his deposition on why he did not contact any of the experts knowledgeable about Weinstock's area of research, Cole responded that he sought only to *"confirm" his assessment of Weinstock* and therefore did not need to consult an expert. His own notes of his conversation with Breslow are telling in that they touch only briefly on the supposedly central issue – the strength of Weinstock's research – but instead go on to describe personal characteristics, *i.e.,* a "perfectly nice person," a "pushover." Cole found the confirmation he needed – confirmation of gender stereotypes that detracted from Weinstock's scholarly achievements. (issue # 6)

In addition, from his conversation with Bersohn, Cole discredited the positive recommendation of Columbia's Chemistry Department, by describing it as a "courtesy" extended to Barnard. If the sincerity of the Columbia

Chemistry Department's letter favoring Weinstock's tenure was ambiguous, the affiliation agreement sets forth formalized procedures for exploring its meaning, either through a written statement to the *ad hoc,* or by testimony before it. Neither option was followed. In light of the fact that Weinstock received 11 votes from Columbia's Chemistry Department in her favor, 4 abstentions from those unfamiliar with her research, and not a single negative vote, Cole's assertion that the recommendation was extended as a mere "courtesy" is to say the least, somewhat startling. The majority's assertion that this vote "*was* a mere 'courtesy' " at best raises a dispute about a material issue of fact. (issue # 7)

Moreover, in assessing the credibility of Cole's reliance on two supposedly negative reports from members of the Columbia Chemistry Department, Weinstock is entitled to the inference from the departmental vote that either (a) Breslow and Bersohn thought well enough of her work to vote to tenure her; or (b) they were among those abstaining because they were unfamiliar with her work. Either inference casts doubt on the validity of Cole's reason. (issue # 8)

Even when the *ad hoc* 's vote is 3-2, it is rare for the provost to reject its recommendation. To justify, at least in part, taking the "rare" action of overruling a positive *ad hoc* committee vote, Cole in his report to the president of Columbia said that Rockefeller University's Professor Cohn – the only member of the *ad hoc* committee who was in plaintiff's field – thought Weinstock's research was "weak." Yet, according to two of the *ad hoc* members, Professor Cohn was positive about plaintiff's candidacy. In fact, in Professor Cohn's own letter to the Chair of Barnard's Chemistry Department following the denial of

tenure, he expressed his unhappiness at Cole's decision to deny Weinstock tenure, stated that he had voted in her favor and had found her research "rather imaginative," and commented that she was an excellent teacher and mentor. Hardly the language used to describe a weak candidate. (issue # 9)

Further, the affiliation agreement provided that the provost was to explain the reasons for his decision to the *ad hoc* whose recommendation he rejected. Cole offered none. After Barnard Professor Braine wrote two letters requesting an explanation, Cole finally answered, but qualified his response by stating that since Weinstock had filed a charge of discrimination with the EEOC, any explanation he offered must be made with the defense of Columbia University in mind. One might fairly ask what defense would be needed if the reason given was not pretextual. (issue # 10)

B. *Cole's Rationale*

For the reader to place Cole's conduct in proper context, some insight into his initial negative view of plaintiff as a woman candidate for tenure in the Chemistry Department can be gained by examining a book he wrote on this subject, *Fair Science: Women in the Scientific Community* (1979). In the book Provost Cole addresses the question of whether women scientists are subject to sex discrimination in matters of promotion. *Id.* at 13. His answer, set forth in chapter 3, *Woman's Place in the Scientific Community,* is "no." Instead, he believes there is a high degree of fairness in the distribution of scientific rewards and that women's lack of success is based on what he terms "universalistic criteria," which, at page 5, he

defines as merit. *See id.* at 82. To put it bluntly, a rational juror could find that in the provost's view, women scientists are *not* subject to discrimination in denial of tenure cases; they simply lack merit.

Faced with such a strong tenure candidate, Cole explained his decision by insisting that Weinstock fell short of the standard needed to obtain tenure in Columbia's Chemistry Department, rather than Barnard's Chemistry Department. This rationale enabled him to mischaracterize all the positive reviews of her work, including Professor Cohn's, by insisting that these reviewers were only positive about Weinstock because they applied a lower standard. It is nonetheless clear from the affiliation agreement that the standards for tenure at Barnard, a small undergraduate institution with limited research facilities, differ from those at Columbia, a large research institution with advanced facilities and a substantial budget and graduate students to assist professors in their research. There is ample evidence to indicate that as a practical matter, two standards, one for tenure at Barnard and one for tenure at Columbia, had emerged. President Futter of Barnard appealed Cole's decision in writing – the first time she had ever appealed a tenure decision in her 12 years as Barnard's president. In his defense, Cole cited the affiliation agreement, arguing that it permitted him to apply identical standards to Barnard and Columbia professors, and that his broad discretion rendered his decision unreviewable.

Cole's nondiscriminatory rationale is from start to finish incredible. Even Professor Breslow, whose testimony he cites in support of his decision, agreed that Sally Chapman, the Chair of Barnard's Chemistry Department, would not have been granted tenure under the standard

Cole claimed to impose on candidate Weinstock. Professor Weinstock was the first woman nominated for tenure in the natural sciences at Columbia or Barnard during Cole's term as provost, and it is apparent that Cole selectively applied a higher standard in her case. The tenure bar was raised for Weinstock because she is a woman. This point was made crystal clear the following year when a male professor in the Physics Department was granted tenure at Barnard despite the fact that at least one member of his *ad hoc* committee *acknowledged* that he would not have received tenure in the Physics Department at Columbia. That is, the tenure bar was lowered for a man. (issue # 11) Standing alone this issue is significant enough to overcome a summary judgment motion.

Even Provost Cole's response to Professor Braine's letter inquiring as to his reasons for denying Weinstock tenure was suspect. Cole insisted that as provost he had to be concerned about the financial impact of tenure on University finances. That statement is inaccurate and disingenuous. The affiliation agreement with Columbia leaves the qualifications review up to the agreed-upon *ad hoc* process, but with respect to financial considerations, Barnard's decision is "final," as the president of Columbia conceded. (issue # 12)

This record reflects gender discrimination incontrovertibly shown by gender stereotyping and by statistics. Further this discrimination occurred under the aegis of a provost granted vast discretion in tenure matters who, the record demonstrates, was guilty of procedural irregularities in violation of the affiliation agreement between Columbia and Barnard, as well as a very large number of credibility issues that cast doubt on the provost's veracity as a witness. In light of this evidence, a reasonable jury

could find that the proffered reason for denial of tenure was pretextual, and that the real reason was sex discrimination in violation of Title VII.

III Law

A. *Summary Judgment*

In their zeal to "clear the calendar" of so-called "doomed lawsuits," my colleagues have overlooked the procedural posture of Weinstock's appeal. Summary judgment is appropriate only when the moving party has shown that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). In determining whether genuine issues of material fact exist, "a court must resolve all ambiguities and draw all reasonable inferences *against* the moving party. . . . [N]ot only must there be no genuine issue as to the evidentiary facts, but there must also be no controversy regarding the inferences to be drawn from them." *Donahue v. Windsor Locks Bd. of Fire Comm'rs,* 834 F.2d 54, 57 (2d Cir.1987) (emphasis added).

In reviewing the facts of this case, the district court and the majority have done the precise opposite – resolved factual issues in Columbia's favor rather than Weinstock's, and disregarded the controversy surrounding 12 of its pivotal facts. These analytical errors are particularly egregious in a discrimination case, where an employer's intent is at issue. As we have repeatedly recognized, evidence of discriminatory intent is usually circumstantial and can only be gleaned from careful scrutiny of the entire record. *See, e.g., Belfi v. Prendergast,* 191 F.3d 129, 135 (2d Cir.1999) ("[T]he trial court must be especially cautious in deciding whether to grant this drastic provisional remedy

in a discrimination case, because the employer's intent is often at issue and careful scrutiny may reveal circumstantial evidence supporting an inference of discrimination."); *Chertkova v. Connecticut Gen. Life Ins. Co.,* 92 F.3d 81, 87 (2d Cir.1996) ("Since it is rare indeed to find in an employer's records proof that a personnel decision was made for a discriminatory reason, whatever other relevant depositions, affidavits and materials are before the district court must be carefully scrutinized for circumstantial evidence that could support an inference of discrimination."); *Gallo v. Prudential Residential Servs., Ltd. Partnership,* 22 F.3d 1219, 1224 (2d Cir.1994) (explaining that court must be cautious about using this "drastic provisional remedy" where "intent is at issue").

B. *Substantive Law on Discrimination – Factors Bearing on Pretext*

1. *Gender Stereotyping.* The discriminatory effect of gender stereotypes is precisely the problem the Supreme Court condemned in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). The majority believes *Price Waterhouse* is inapplicable to this case because unlike Ann Hopkins, who was advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry," *id.* at 235, 109 S.Ct. 1775, Weinstock did not face "carping." This logic misapprehends why stereotyping is discriminatory. The irony of *Price Waterhouse* arose from the fact that Hopkins' so-called masculine qualities – what others perceived as her abrasiveness – would have been valued qualities in a man being considered for partnership. Price Waterhouse discriminated against Hopkins because although she performed the "masculine" role of

competing successfully for business, the firm punished her for not *simultaneously* performing the "feminine" role of speaking softly and having a feminine appearance. The Supreme Court held that Hopkins' failure to fulfill this gendered role was an impermissible consideration in the partnership decision.

This case presents the mirror image of *Price Waterhouse.* Cole's decision to deny Weinstock tenure was based – ironically – on her perceived *success* at projecting a stereotypically "feminine" image at work. Weinstock was described as gentle and caring, "nice," a "pushover," and nurturing. Unfortunately for Weinstock, a stereotypically "feminine" person is not viewed in a male dominated field as a driven, scientifically-minded, competitive academic researcher. The inappropriate focus on Weinstock's "feminine" qualities in the tenure process led Cole and perhaps others to discount her "masculine" success as a researcher and professor. While Hopkins was punished for failing to perform a "feminine" role, Weinstock was punished for performing it too well.

The problem both Weinstock and Hopkins faced is that their employers demanded that they perform both "masculine" and "feminine" roles, yet perceived those roles as fundamentally incompatible. Unlike "masculine" men at *Price Waterhouse,* Hopkins was punished because her "masculinity" appeared inconsistent with gendered stereotypes of how women should look and behave; Weinstock was punished because her "femininity" appeared inconsistent with "masculine" success as a researcher. Yet if Weinstock had chosen to project a more "masculine" image, she could very well have suffered the same fate as Hopkins.

2. *Procedural Irregularities.* In the instant case, Weinstock has raised significant questions about Columbia's proffered nondiscriminatory reason for its tenure decision – more than enough evidence to overcome a motion for summary judgment. In any other employment setting, the procedural irregularities and shifting standards outlined earlier that characterized the entire process of Weinstock's tenure review, would undeniably suggest pretext. *See DeMarco v. Holy Cross High Sch.,* 4 F.3d 166, 171 (2d Cir.1993) (implausibility of employer's nondiscriminatory rationale shows pretext); *Schmitz v. St. Regis Paper Co.,* 811 F.2d 131, 132-33 (2d Cir.1987) (employer shifting explanations provides evidence of pretext). The context of a tenure decision is no different, as Title VII applies with the same force to universities as to all employers. *University of Pa. v. EEOC,* 493 U.S. 182, 190-91, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990).

In fact, we have held that procedural irregularities can create an inference of discrimination in tenure decisions. *See Stern v. Trustees of Columbia Univ.,* 131 F.3d 305, 313 (2d Cir.1997) (reversing summary judgment where procedural irregularities raised inference that reasons given for employment decision were not the real reasons); *Zahorik v. Cornell Univ.,* 729 F.2d 85, 93 (2d Cir.1984) (procedural irregularities can raise an inference of bias). Whether the affiliation agreement gave Cole the power to reject unilaterally the *ad hoc*'s tenure recommendation has no bearing on whether he exercised that discretion in a discriminatory fashion. The discretion accorded to Cole as university provost does not place his actions above the law.

In addition to the ample evidence of pretext plaintiff has offered, the facts in this case also create an inference

of sex discrimination, suggesting that Weinstock might well have ultimately prevailed had she been given her day in court. In any other employment setting, the use of gendered stereotypes suggests sex discrimination. It is not necessary that these stereotypes form the sole basis for an employer's decision. Weinstock need only show that her gender was a "motivating factor" in Columbia's decision. *See Price Waterhouse,* 490 U.S. at 250, 109 S.Ct. 1775; *Renz v. Grey Advertising, Inc.,* 135 F.3d 217, 221-22 (2d Cir.1997); *Montana v. First Fed. Sav. & Loan Ass'n,* 869 F.2d 100, 105 (2d Cir.1989). When this strong evidence of pretext is considered in the context of gender stereotypes evident in Columbia's handling of Weinstock's tenure case, it creates an inference of sex discrimination, suggesting that Weinstock might well have ultimately prevailed had she been given her day in court. *See Reeves v. Sanderson Plumbing Products,* ___ U.S. ___, ___, 120 S.Ct. 2097, 2108, 147 L.Ed.2d 105 (2000). In holding that evidence of pretext, when combined with a *prima facie* case could, as a matter of law, support a jury's finding of discrimination, the Supreme Court in *Reeves* clarified what circumstances might make that showing insufficient: "An employer would be entitled to judgment as a matter of law if *the record conclusively revealed* some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was *abundant and uncontroverted independent evidence* that no discrimination had occurred." *Id.* at ___, 120 S.Ct. at 2109 (emphases added). Thus, to overcome as a matter of law a finding of discrimination based on pretext plus a *prima facie* case, a defendant must point to evidence in the record clearly indicating that for some reason, plaintiff's evidence of pretext in that particular case should not carry the weight

normally assigned to it under general principles of evidence law. *See Reeves,* ___ U.S. at ___, 120 S.Ct. at 2108 (relying on "the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.' ") (quoting *Wright v. West,* 505 U.S. 277, 296, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992)). In the case before us, Weinstock has raised material issues of fact on pretext sufficient for a rational jury to find in her favor. Columbia points to no reason why all rational factfinders would necessarily discount that evidence of pretext. That is, Columbia has not produced the strong, independent evidence of a third motive or alternative rationale that *Reeves* requires to overcome a plaintiff's proof of pretext and prevail as a matter of law. In this regard, Weinstock has more than met her burden to obtain a trial on the merits.

3. *Statistical Proof.* In addition, Columbia's abysmal record of promoting women professors in the hard sciences is probative evidence on the issue of sex discrimination. An employer's poor record of hiring and promoting members of a protected class can often provide statistical evidence of discrimination under Title VII, *see International Bh'd of Teamsters v. United States,* 431 U.S. 324, 335 & n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), and can at times, even standing alone, constitute a *prima facie* case of discrimination. *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 501, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989); *Hazelwood Sch. Dist.,* 433 U.S. at 307-08, 97 S.Ct. 2736; *Teamsters,* 431 U.S. at 339, 97 S.Ct. 1843.

CONCLUSION

The ultimate question we have to answer is *not* whether Provost Cole's conduct violated the letter and the spirit of the affiliation agreement between Barnard and Columbia – which it so obviously did – it is whether Cole's actions violated federal and state anti-discrimination laws. The record suggests that Weinstock was denied tenure not because her scholarship was lacking, as Columbia insists, but because she is a woman. The magnitude of the proof Weinstock offered – reflected in the 12 issues identified above – raises significant, material issues of fact with respect to pretext that cast doubt on Columbia's purported nondiscriminatory reason for denying her tenure. Were a jury to believe that Columbia has falsely manufactured its reasons for denying plaintiff tenure as a chemistry professor at Barnard – particularly where that disbelief is accompanied by a suspicion of mendacity – that disbelief together with the elements of plaintiff's *prima facie* case already conceded may be sufficient to prove unlawful discrimination at trial. *See Reeves,* ___ U.S. at ___-___, 120 S.Ct. at 2101-02; *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 511 & n. 4, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). *Reeves,* which held that a *prima facie* case, combined with proof of pretext can, as a matter of law, sufficiently support a jury's finding of discrimination, makes clear that a plaintiff, by showing a material question of fact with regard to pretext, logically defeats a motion for summary judgment.

Although broad discretion did rest in the provost, it is limited by the agreement with Barnard and by the bounds of Title VII law. For that reason, his discretion did not constitute him, as he appeared to think, a law unto himself. The sad irony here is that this fabled University, the

oldest college in New York State and the fifth oldest in the nation, and a leading voice for fair and equal rights for women, could continue to countenance for such a prolonged time, a disgraceful record of discrimination against women pursuing academic preferment in the natural sciences, a record that culminates in this case.

Columbia's success in depriving its sister college of Professor Weinstock's services in its Chemistry Department and in having this Court vindicate that decision, must, at some level, be viewed as a victory for Columbia and its provost. But at what price?

1999 WL 549006

United States District Court, S.D. New York.

Shelley WEINSTOCK, Plaintiff,

v.

COLUMBIA UNIVERSITY, Defendant.

No. 95 Civ. 0569(JFK).

July 28, 1999.

Vladeck, Waldman, Elias & Engelhard, P.C., New York, NY, Anne C. Vladeck, Anne L. Clark, for Plaintiff, of counsel.

Goldstein & Morris, LLP, New York, NY, Mark L. Goldstein, Andrea H. Stempel, for Defendant, of counsel.

OPINION and ORDER

KEENAN, J.

Before the Court is Defendant's motion for summary judgment on all of Plaintiff's claims, pursuant to Fed.R.Civ.P. 56. For the reasons discussed below, Defendant's motion is granted.

Background

This case stems from Defendant Columbia University's ("Columbia") denial of tenure to Plaintiff Shelley Weinstock. Plaintiff was employed by Barnard College ("Barnard"), an undergraduate college and affiliate of Columbia, as an Assistant Professor in the Barnard Chemistry Department from July 1985 through June 1994. Plaintiff, a female, claims that she was denied tenure on the basis of her gender and brings this action under Title VII of the Civil Rights Acts of 1964, as

amended, 42 U.S.C. § 2000e et seq. ("Title VII"), Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681 et seq. ("Title IX"), the New York State Human Rights Law, N.Y. Executive Law § 296 et seq., and the Administrative Code of the City of New York § 8-107 et seq.

Plaintiff's Qualifications

Plaintiff is a biochemist whose research focuses primarily on blood substitutes and artificial organs. *See* Pl.'s 56.1 Stmt. ¶ 86. Plaintiff was awarded a Ph.D. in Nutritional Biochemistry and Metabolism by the Massachusetts Institute of Technology ("MIT") in 1982. From 1982 to 1985, Plaintiff was a Post-Doctoral Research Fellow at the Harvard School of Public Health in Physiology and Nutrition and in the Interdisciplinary Program in Health. From 1985 until 1994, Plaintiff was an Assistant Professor in the Barnard Chemistry Department. In the fall of 1990, Plaintiff was a visiting Scientist at the MIT Department of Chemical Engineering. In July 1994, Plaintiff was Co-Chairperson of the XI Conference of the International Society of Artificial Cells and Immobilization Biotechnology and IV International Symposium on Blood Substitutes. This honor was listed on the curriculum vitae submitted to the ad hoc committee that considered her tenure candidacy. Plaintiff published six articles in peer-reviewed, refereed journals and three chapters in peer-reviewed books after she began teaching at Barnard. While at Barnard, Plaintiff received grants from the National Institute of Health ("NIH"), the Office of Naval Research, and the Johnson & Johnson Corporation. Plaintiff also received a number of letters of recommendation for

tenure from scholars in her field and positive teaching reviews.

The Tenure Process

Plaintiff became eligible for tenure during the Spring semester of the 1992-93 academic year. The 1993 Amended Agreement Between Columbia University and Barnard College (the "Affiliation Agreement") sets forth the tenure procedures for Barnard faculty. *See* Def.'s 56.1 Stmt. ¶ 2. Once the President of Barnard forwards a nomination for tenure to the Provost of Columbia, the Provost must convene a five person University ad hoc committee to review the nomination. *See* Stempel Decl., Exh. M, at 6. The Affiliation Agreement provides that the appointment will be made if the advice of the ad hoc committee is favorable, the President of Columbia accepts the advice, and the Trustees of Barnard and Columbia approve such advice. *See* Stempel Decl., Exh. M at 7.

Pursuant to the Affiliation Agreement, an ad hoc committee considering a Barnard candidate for tenure must consist of the following: two faculty members from Columbia appointed by a body called the Tenure Review Advisory Committee ("TRAC"), with the approval of the Provost of Columbia, two Barnard faculty members appointed by the Provost from a list of four names provided by the Dean of the Faculty of Barnard, and one faculty member from an academic institution that has no affiliation with Columbia or Barnard, who is appointed by the Provost with the advice and consent of the Dean of the Faculty at Barnard. *See* Def.'s 56.1 Stmt. ¶ 17. Faculty members from the nominating department or its counterpart from Columbia, as well as faculty members from

Barnard who participated in earlier reviews of the candidate for purposes of tenure, are ineligible to serve on the ad hoc committee reviewing a Barnard candidate for tenure. *See* Def.'s 56.1 ¶ 19.

Plaintiff received the unanimous support of the Barnard Chemistry Department, which was chaired by Sally Chapman, and the Barnard Committee on Appointments, Tenure and Promotions ("ATP"). The Columbia Department of Chemistry, chaired by Richard Bersohn, also voted for tenure, with eleven votes in favor, none against, and four abstentions by members of the Department who were not familiar with Plaintiff's field. *See* Pl.'s 56.1 Stmt. ¶ 14; Def.'s 56.1 Stmt. ¶ 14; Stempel Decl., Exh. H, Exh. 3. The President of Barnard, Ellen Futter, initially had reservations about Plaintiff's scholarship but ultimately decided in favor of granting Plaintiff tenure and recommended that Plaintiff's nomination be forwarded on in the process. *See* Pl.'s 56.1 Stmt. ¶¶ 12-13; Vladeck Aff., Exh. E. ("Futter Dep.") at 12.

The Provost of Columbia, Jonathon Cole, with the assistance of the TRAC, selected Professor Samuel Silverstein, the Chair of the Department of Physiology and Cellular Biophysics, and Professor Alan Tall, the Chair of the Department of Medicine, to represent Columbia on Plaintiff's ad hoc committee. *See* Def.'s 56.1 Stmt. ¶ 21. Provost Cole selected Zanvil Cohn, Professor and Senior Physician, Laboratory of Cellular Physiology and Immunology, Vice President for Medical Affairs Rockefeller University, as the outside member for Plaintiff's ad hoc committee. *See* Def.'s 56.1 Stmt. ¶ 22. Provost Cole selected Professor Lila Braine, Department of Psychology, and Professor Paul Hertz, Department of Biological Sciences, from the four names proposed by Barnard's Dean

of Faculty, Robert McCaughey, as the Barnard representatives for Plaintiff's ad hoc committee. *See* Def.'s 56.1 Stmt. ¶ 20; Pl.'s 56.1 Stmt. ¶ 20.

Provost Cole, in consultation with members of TRAC, appointed Tall as Chair of Plaintiff's ad hoc committee. *See* Def.'s 56.1 Stmt. ¶ 23. The Chair of the ad hoc committee may contact committee members in advance of the meeting to determine whether further information is needed to complete the tenure dossier. Prior to the April 12, 1993 ad hoc meeting, Tall telephoned the committee members to discuss the completeness of the tenure dossier and to determine if any committee member wanted additional information regarding Plaintiff's candidacy. *See* Def.'s 56.1 Stmt. ¶ 25. According to Braine and Hertz, Tall informed each of them that he thought there were problems with Plaintiff's candidacy during this phone call. *See* Vladeck Aff., Exh. A ("Braine Dep.") at 12-14; Exh. F ("Hertz Dep.") at 10. Braine stated that she felt Tall was trying to "twist [her] arm" on the subject.[1] Both Braine and Hertz considered Tall's remarks to be improper prior to the actual ad hoc meeting and reported the substance of Tall's calls to Dean McCaughey. *See id.*

The ad hoc meeting

The ad hoc committee met for approximately two to three hours on April 12, 1993, to consider Plaintiff's candidacy for tenure. At the outset of the ad hoc meeting,

[1] The Court notes that Braine's statement would be inadmissible at trial under F.R.E. 701.

Dean McCaughey questioned the propriety of Tall's telephone calls to members of the committee. Provost Cole then inquired whether any of the committee members' opinions of Plaintiff had been influenced by the conversations with Tall prior to the meeting, and no one responded in the affirmative. *See* Stempel Decl., Exh. A, ("Cole Dep.") at 190, 294; Pl.'s 56 .1 Stmt. ¶ 27. Sally Chapman, Chair of the Barnard Chemistry Department, appeared before the ad hoc committee and presented Plaintiff's case for tenure. *See* Def.'s 56.1 Stmt. ¶ 30. Provost Cole instructed the ad hoc committee that the standards for tenure were high because Columbia is an internationally renowned research university with undergraduate teaching responsibilities. *See id.* ¶ 44. Provost Cole also asked the members of the committee whether Plaintiff would be granted tenure at Columbia. *See* Pl.'s 56.1 Stmt. ¶ 44.

During the meeting, both Tall and Silverstein referred to Plaintiff, whom they had never met, as "Shelley," and allegedly commented that Plaintiff seemed "nice."[2] *See* Hertz Dep. at 40-43. Hertz testified that he found this to be inappropriate and patronizing and that Tall and Silverstein may have discussed Plaintiff in such a manner because she is a woman. *See id.* Hertz also testified, however, that "[o]n the other hand, they may have picked up on the fact that, I don't remember if we did or not, we may very well just referred to her as Shelley and they may

[2] Plaintiff also alleges that Tall and Silverstein commented that Plaintiff seemed "nurturing." Although there is no evidence in the record to support Plaintiff's allegation that this specific word was used, Tall and Silverstein agree that the concept of Plaintiff being a supportive or nurturing mentor was discussed. *See* Silverstein Dep. at 38; Tall Dep. at 37.

have simply been mimicking what we were doing." *See id.* at 41. Braine testified that she believed Tall and Silverstein may have devalued Plaintiff's work at the ad hoc meeting because Plaintiff is a woman. *See* Braine Dep. at 56-57.

Tall and Silverstein believed that the quality of Plaintiff's publications and research papers was insufficient to merit tenure. *See* Silverstein Dep. at 22- 23; Tall Dep. at 21-22. Both testified that her research lacked originality and that the journals Plaintiff published in were not first-tier scientific journals. *See* Silverstein Dep. at 26-27; Tall Dep. at 21-22, 27. In addition, both Silverstein and Tall were not sufficiently impressed with the letters from outside referees who were asked to evaluate Plaintiff's candidacy for tenure. Silverstein testified that the letters were only weakly supportive, not from authorities that he recognized, and did not compare with the quality or types of letters he had experienced in other tenure review processes at Columbia. *See* Silverstein Dep. at 30-31. Tall and Silverstein also testified that they accorded less weight to letters from Plaintiff's mentors, collaborators, or those personally acquainted with Plaintiff because they felt the letters may not have been objective. *See* Silverstein Dep. at 32-33; Tall Dep. at 58-60.

The ad hoc committee voted three to two in favor of granting tenure to Plaintiff. Braine, Hertz, and Cohn voted in favor of granting tenure to Plaintiff. Tall and Silverstein voted against granting tenure.

Post ad hoc proceedings

After the ad hoc meeting, Provost Cole telephoned Ronald Breslow and Richard Bersohn, members of the

Columbia Chemistry Department, to obtain additional information about the Chemistry Department's opinion of Plaintiff's candidacy for tenure. *See* Def.'s 56.1 Stmt. ¶ 48. Breslow expressed his opinion that Plaintiff was not in the same class as other tenured members of the Barnard Chemistry Department in terms of intellectual strength or scientific ability. *See id.* ¶ 50. Defendant claims that Provost Cole had the authority to conduct subsequent investigations regarding a tenure candidate after the ad hoc committee. *See id.* ¶ 52. Plaintiff, however, argues that Provost Cole had conducted subsequent investigations in only a few cases and that Cole should have contacted experts in Plaintiff's field if he were going to conduct further investigation, rather than contacting members of the Columbia Chemistry department. Futter, the President of Barnard, believed it was a violation of the Affiliation Agreement for Provost Cole to have conducted his own investigation absent extraordinary circumstances that she felt were not present in Plaintiff's case. *See id.*

The Provost of Columbia makes a recommendation to the President of Columbia regarding the grant or denial of tenure. *See* Def.'s 56.1 Stmt. ¶ 53. Michael Sovern, the President of Columbia at the time Plaintiff was denied tenure, acknowledges that he accepted the provostal recommendations as a matter of course and did not ever overrule a provost's recommendation regarding tenure. *See* Vladeck Aff., Exh. K ("Sovern Dep.") at 11-12. Provost Cole recommended to President Sovern that Plaintiff be denied tenure and President Sovern denied Plaintiff tenure. *See id.* ¶ 56.

Plaintiff learned in May 1993 that she had been denied tenure. *See* Weinstock Dep. at 59. By letter dated May 14, 1993, Dean McCaughey objected to alleged

procedural flaws in the ad hoc and post ad hoc process, and requested that Provost Cole either reverse his decision and allow the ad hoc committee's recommendation in favor of tenure to stand, or reconvene the ad hoc committee to consider the additional material gathered by Provost Cole. *See* Def.'s 56.1 Stmt. ¶¶ 68-69. Provost Cole refused to change his recommendation to the President regarding Plaintiff's tenure candidacy. A letter was sent out in Provost Cole's name, dated May 26, 1993, stating that the ad hoc committee did not recommend that Plaintiff be granted tenure and that he accepted the committee's recommendation. *See* Vladeck Aff., Exh. PP. In a letter to President Futter dated June 7, 1993, Provost Cole then stated that the May 26 letter had been in error and that he made the decision to recommend denying Plaintiff tenure "after taking into account the deliberations of the committee and additional information [he] obtained on her nomination." *See* Vladeck Aff., Exh. QQ.

Under the official procedures governing tenure to Barnard Candidates, whenever the Provost does not accept the decision of the ad hoc committee, he is to provide the committee with his reasons. *See* Pl.'s 56.1 Stmt. ¶ 137. Provost Cole did not provide his reasons for rejecting the decision of Plaintiff's ad hoc committee to the committee members until after Braine had written two letters requesting an explanation, one dated December 2, 1993, and the second dated January 14, 1994. *See id.* ¶ 138. Provost Cole, in a letter dated January 20, 1994, indicated that Plaintiff had filed a charge with the EEOC and that, as a result, his explanation "must necessarily be prepared within the context of our defense of the University." *See* Vladeck Aff., Exh. O. By letter dated February 21, 1994, Provost Cole then provided Braine with an

explanation for his decision to reject the ad hoc committee's recommendation. The letter stated: that a favorable vote of 3-2 was not a strong endorsement; that the two Columbia members of the committee felt that her research was limited and not of the quality expected of a candidate for tenure; that candidates from Columbia and Barnard were to be judged for tenure by the same standards; that Cohn, the outside member of the ad hoc committee, had stated that Plaintiff would not receive tenure at a research university such as Columbia even though he felt that her research was adequate for an institution such as Barnard; that Provost Cole concluded that Plaintiff's scholarship was not strong enough to merit tenure and had collected additional information which confirmed his assessment. *See* Vladeck Aff., Exh. P.

By letter dated June 29, 1993, President Futter requested that President Sovern reject Provost Cole's recommendation concerning Plaintiff's tenure nomination and accept the favorable recommendation of the ad hoc committee, or in the alternative, institute a new ad hoc committee to review Plaintiff's nomination. The Affiliation Agreement provides that the President of Barnard may request that a second ad hoc review be conducted if there is evidence of procedural defects or irregularities. *See* Stempel Decl., Exh. M at 7. President Futter believed that there were procedural irregularities in Plaintiff's tenure process which violated the Affiliation Agreement. *See* Futter Dep. at 56. This was the only time during Futter's tenure as Barnard President that she fought Columbia's

denial of tenure to a Barnard faculty member. *See* Pl.'s 56.1 Stmt. ¶ 72.[3]

George Rupp replaced Michael Sovern as President of Columbia in July 1993. In response to President Futter's protest of the denial of tenure to Plaintiff, President Rupp wrote a letter dated August 3, 1993, informing President Futter that he had reviewed Plaintiff's case and agreed with Provost Cole's determination that Plaintiff's research did not meet the standards expected of a tenured faculty member. President Rupp also indicated that he did not believe there were any procedural irregularities in Plaintiff's tenure process. *See* Vladeck Aff., Exh. NN. President Rupp therefore declined to reverse the decision to deny Plaintiff tenure.

Discussion

Defendant now moves for summary judgment on all of Plaintiff's claims.

Summary Judgment Standards

A motion for summary judgment may be granted under Fed.R.Civ.P. 56 if the entire record demonstrates that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby,* 477 U.S. 242, 250 (1986).

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[3] Defendant points out, however, that since the current system of tenure was implemented in 1982, only three professors at Barnard – one male and two females, including Plaintiff – have been denied tenure. *See* McCaughey Dep. at 27-28.

"In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim." *Goenaga v. March of Dimes Birth Defect Found.*, 51 F.3d 14, 18 (2d Cir.1995) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)). When viewing the evidence, the Court must "assess the record in the light most favorable to the non-movant and . . . draw all reasonable inferences in its favor." *Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 177 (2d Cir.1990); *see McLee v. Chrysler Corp.*, 109 F.3d 130, 134 (2d Cir.1997). Although the movant initially bears the burden of showing that there are no genuine issues of material fact, once such a showing is made, the opposing party must "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. Unsupported allegations will not suffice to create a material issue of fact. *See Goenaga*, 51 F.3d at 18. Rather, the party opposing the motion must produce sufficient evidence to permit a reasonable jury to return a verdict in its favor. *Anderson*, 477 U.S. at 248; *Trans Sport, Inc. v. Starter Sportswear*, 964 F.2d 186, 188 (2d Cir.1992) (finding that the nonmovant must "come forward with enough evidence to support a jury verdict in its favor, and the motion will not be defeated merely . . . on the basis of conjecture or surmise") (citation omitted).

Although it is necessary to evaluate a party's intent in discrimination cases, the Second Circuit has held that summary judgment is appropriate in discrimination cases under certain circumstances:

> [W]e are of course mindful that summary judgment is ordinarily inappropriate where an individual's intent and state of mind are implicated. The summary judgment rule would be rendered sterile, however, if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion. Indeed, the salutary purposes of summary judgment – avoiding protracted, expensive and harassing trials – apply no less to discrimination cases than to commercial or other areas of litigation.

Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir.1985) (citations omitted); *see, e.g., D'Amico v. City of New York,* 132 F.3d 145, 151 (2d Cir.1998) (affirming grant of summary judgment for employer in ADA case); *McLee v. Chrysler Corp.,* 109 F.3d 130 (2d Cir.1997) (affirming grant of summary judgment for employer in race discrimination case); *Shumway v. United Parcel Service,* 118 F.3d 60 (2d Cir.1997) (affirming grant of summary judgment in sex discrimination case); *Wernick v. Federal Reserve Bank of New York,* 91 F.3d 379 (2d Cir.1996) (affirming grant of summary judgment in ADA and Rehabilitation Act case); *Holt v. KMI-Continental, Inc.,* 95 F.3d 123 (2d Cir.1996) (affirming grant of summary judgment for employer in race and sex discrimination case), *cert. denied,* 117 S.Ct. 1819 (1997); *De La Cruz v. New York City Human Resources Dept.,* 82 F.3d 16 (2d Cir.1996) (affirming grant of summary judgment for employer in race discrimination case).

Plaintiff's Discrimination Claims

Plaintiff alleges that Defendant violated Title VII, Title IX, N.Y. Executive Law § 296, and the Administrative

Code of the City of New York, by intentionally discriminating against her on the basis of her sex. Title VII makes it unlawful "for an employer . . . to fail to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). To analyze a Title VII discrimination claim, a court applies the three-step burden shifting analysis established in *McDonnell Douqlas Corp. v. Green,* 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25, 36 L.E.2d 668 (1973). *See St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 506-08, 113 S.Ct. 2742, 2746-47, 125 L.Ed.2d 407 (1993); *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 252-256, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981); *Holt v. KMI-Continental, Inc.,* 95 F.3d 123, 129 (2d Cir.1996). The same standards apply to employment discrimination claims brought under Title IX, the Executive Law, and the City Code. *See Torres v. Pisano,* 116 F.3d 625, 629 n. 1 (2d Cir.1997); *Murray v. New York Univ. College of Dentistry,* 57 F.3d 243, 248 (2d Cir.1995); *Reed v. A.W. Lawrence & Co.,* 95 F.3d 1170, 1177 (2d Cir.1996); *Jalal v. Columbia Univ.,* 4 F.Supp.2d 224, 232 n. 10 (S.D.N.Y.1998).

The plaintiff has the initial burden of proving by a preponderance of the evidence a prima facie case of discrimination. *See McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. at 1824; *Chambers v. TRM Copy Centers Corp.,* 43 F.3d 29, 37 (2d Cir.1994). This may be done by showing: (1) that Plaintiff belongs to a protected class; (2) that she applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite her job qualifications, she was denied the position; and (4) that the denial of the position occurred in circumstances giving rise to an

inference of discrimination.[4] *See Stern v. Trustees of Columbia Univ.,* 131 F.3d 305, 311-312 (2d Cir.1997).

A plaintiff is "qualified" for tenure within the meaning of the second element of this test when she can show that "some significant portion of the departmental faculty, referrants or other scholars in the particular field hold a favorable view on that question." *Zahorik v. Cornell University,* 729 F.2d 85, 93-94 (2d Cir.1984); *Jalal,* 4 F.Supp.2d at 233. The burden of proof that Plaintiff must meet to establish a prima facie case is minimal. *See Hollander v. American Cyanamid Co.,* 172 F.3d 192, 199 (2d Cir.1999). If the plaintiff makes a prima facie showing of discrimination, the law creates a presumption that the employer unlawfully discriminated against the plaintiff. *See Fisher v. Vassar College,* 114 F.3d 1332, 1335 (2d Cir.1997) (en banc), *cert. denied,* 118 S.Ct. 851 (1998). The burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for the employee's rejection. *Burdine,* 450 U.S. at 253, 101 S.Ct. at 1093; *McDonnell Douglas Corp.,* 411 U.S. at 802, 93 S.Ct. at

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[4] The Court of Appeals for the Second Circuit has not been consistent in its articulation of the fourth element of this test, however. In *Fisher v. Vassar College,* 114 F.3d 1332 (2d Cir.1997) (en banc), *cert. denied,* 118 S.Ct. 851 (1998), decided prior to *Stern,* the Court of Appeals listed the fourth element as requiring that the position was ultimately filled by a person not of the protected class. *See* 114 F.3d at 1335; *see also Jenkins v. Metropolitan Opera Ass'n, Inc.,* No. 96 Civ. 6665, 1999 WL 147745, at *5 n. 3 (S.D.N.Y. March 18, 1999) (discussing inconsistency within Second Circuit on fourth element of the *McDonnell Douglas* test); *Fesce v. Guardsman Elevator Co.,* No. 96-6783, 1998 WL 142350, at *7 (S.D.N.Y. March 26, 1998) (same), *aff'd,* 173 F.3d 844 (2d Cir.1999); *Jalal v. Columbia Univ.,* 4 F.Supp.2d 224, 232-33 n. 11 (S.D.N.Y.1998) (same); *Bickerstaff v. Vassar College,* 992 F.Supp. 372, 373 (S.D.N.Y.1998) (same).

1824; *Shumway v. United Parcel Service, Inc.,* 118 F.3d 60, 63 (2d Cir.1997). "Any legitimate, non-discriminatory reason will rebut the presumption triggered by the prima facie case . . . the defendant need not persuade the court that it was actually motivated by the proffered reason." *Fisher,* 114 F.3d at 1335 (quoting *Burdine,* 450 U.S. at 254, 101 S.Ct. at 1094). If the defendant satisfies this burden of production, the presumption of discrimination "simply drops out of the picture" and the plaintiff has the burden to prove by a preponderance of the evidence that the employer's stated reason was merely a pretext for discrimination. *See St. Mary's,* 509 U.S. at 507-08, 113 S.Ct. at 2747; *Burdine,* 450 U.S. at 253, 101 S.Ct. at 1093; *Fisher,* 114 F.3d at 1336. As the Court of Appeals noted in *Fisher,* "the label 'pretext' does not answer the question . . . discrimination does not lurk behind every inaccurate statement. Individual decision-makers may intentionally dissemble in order to hide a reason that is non-discriminatory but unbecoming or small-minded, such as . . . institutional politics, envy, nepotism, spite or personal hostility." 114 F.3d at 1337.

Tenure decisions, while presenting certain distinct issues, are nevertheless subject to Title VII. *See Fisher,* 114 F.3d 1332; *Zahorik,* 729 F.2d at 93. The Court of Appeals, however, has "repeatedly noted that tenure decisions involve unique factors that set them apart from other employment decisions." *Peterson v. City College,* 32 F.Supp.2d 675, 684 (S.D.N.Y.1999) (quoting *Batra v. Pace Univ.,* No. 90 Civ. 4315, 1998 WL 684621, at *7 (S.D.N.Y. Sept. 30, 1998) (citing *Fisher,* 70 F.3d at 1434-35; *Zahorik,* 729 F.2d at 92-93; *Lieberman v. Gant,* 630 F.2d 60, 64 (2d Cir.1980)). "Because tenure decisions involve a myriad of considerations and are made by numerous individuals and

committees over a lengthy period of time, a plaintiff 'faces an uphill battle in her efforts to prove discrimination . . . in the refusal to grant her tenure.'" *Batra v. Pace Univ.*, No. 90 Civ. 4315, 1998 WL 684621, at *7 (S.D.N.Y. Sept. 30, 1998) (quoting *Kawatra v. Medgar Evers College,* No. 86 Civ.1946, 1997 WL 722703, at *5 (E.D.N.Y. Sept. 25, 1997)). Thus, even though tenure decisions are not immune from review under Title VII, a court "should exercise caution in second-guessing a tenure decision and should not 'sit as a super tenure-review committee.'" *Id.* (quoting *Negussey v. Syracuse Univ.*, No. 95 Civ. 1827, 1997 WL 141679, at *6 (N.D.N.Y. Mar. 24, 1997)); *see Peterson,* 32 F.Supp.2d at 685.

Application

Defendant now argues that Plaintiff failed to meet her initial burden of proving a prima facie case of discrimination and that, even if the Court determines that Plaintiff established a prima facie case, Plaintiff cannot prove that Defendant's proffered reason for denying tenure was pretextual and that the real reason was discriminatory. In the instant case, Plaintiff is a member of a protected class, her tenure candidacy was supported by her department, the Barnard ATP Committee, the President of Barnard, the Columbia Chemistry department, and three out of five members of the ad hoc committee, and she was denied tenure. Based on these factors, Plaintiff has met the minimal burden of proving a prima facie case of discrimination. *See Peterson,* 32 F.Supp.2d at 685 (assuming Plaintiff made out a prima facie case rather than applying the *McDonnell-Douglas* test formalistically); *Evans v. Golub Corp.*, 29 F.Supp.2d 194, 201 (S.D.N.Y.1998) (same); *Bickerstaff v. Vassar College,* 992 F.Supp. 372, 374 (S.D.N.Y.1998) (same);

Lapsey v. Columbia Univ., 999 F.Supp. 506, 515 (S.D.N.Y.1998) (listing a number of cases which have assumed that the plaintiff established a prima facie case of discrimination).

Defendant has articulated a legitimate non-discriminatory reason for denying Plaintiff tenure: that Plaintiff lacked the requisite scholarship required for tenure at Columbia. The ultimate question then is whether Plaintiff has presented sufficient evidence from which a reasonable finder of fact could conclude that the Defendant discriminated against her illegally. Plaintiff argues that a jury could infer that the reason given for the denial of tenure was a pretext for discrimination based on Plaintiff's evidence that Tall, Silverstein and Cole were biased against Plaintiff because she is a woman, that Columbia applied a more stringent standard to Plaintiff than it did to male Barnard candidates for tenure, that there were numerous procedural irregularities throughout Plaintiff's tenure candidacy, and that Columbia provided shifting justifications for denying Plaintiff tenure.

1. Alleged Bias of Tall, Silverstein and Cole

According to Plaintiff, Tall and Silverstein criticized Plaintiff in a patronizing tone and made statements during the ad hoc meeting that demonstrated gender bias. In addition, Plaintiff alleges that both Tall and Silverstein found ways to criticize all the positive referee letters written about Plaintiff by experts in the field. Plaintiff

also alleges that Provost Cole expressed a negative view about her and her research at the ad hoc meeting.[5]

Plaintiff claims that discriminatory intent can be inferred from Tall and Silverstein referring to her as "Shelley" at the ad hoc meeting, commenting that Plaintiff seemed "nice," and allegedly commenting that Plaintiff seemed "nurturing." Plaintiff argues that the comments that she was "nice" and "nurturing" reflect gender bias because these are qualities conforming with feminine stereotypes.[6] "Evidence of sexual stereotyping may provide proof that an employment decision ... was based on gender." *Galdieri- Ambrosini v. National Realty Dev. Corp.,* 136 F.3d 276, 289 (2d Cir.1998) (citing *Price Waterhouse v. Hopkins,* 490 U.S. 228, 250-51, 109 S.Ct. 1775, 1790-91, 104 L.Ed.2d 268 (1989)). However, even assuming that "nice" is a quality conforming with a feminine stereotype, that it was inappropriate to refer to Plaintiff by her first name, and assuming that "nurturing" was in fact used to describe Plaintiff at the ad hoc meeting, "remarks at work that are based on sex stereotypes do not inevitably

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[5] The record reflects that Provost Cole asked questions during the meeting, as was his normal practice, and while the impression was that he was not supportive of Plaintiff's candidacy, there is no testimony that Provost Cole made any remarks that could be construed as biased. *See* McCaughey Dep. at 50-52; Braine Dep. at 18, 20-21; Hertz Dep. at 29.

[6] The Court notes that men are frequently referred to as nice, as in "He is a nice guy." The suggestion that "nice" is a feminine adjective or somehow implies femininity is further belied by the famous quote from the late Leo Durocher when he managed the Brooklyn Dodgers in the early 1940s. "Nice guys finish last" is what Durocher said about the New York Giant Manager Mel Ott, who is now in the Baseball Hall of Fame.

prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision." *See Price Waterhouse v. Hopkins,* 490 U.S. 228, 251, 109 S.Ct. 1775, 1791, 104 L.Ed.2d 268 (1989); *Galdieri-Ambrosini,* 136 F.3d at 290 (affirming district court's grant of judgment as a matter of law for defendant on finding that, based on the evidence presented, no reasonable juror could have found that defendant discriminated against Plaintiff on the basis of gender).[7]

Plaintiff was described as nice, supportive or nurturing in the context of discussing her positive attributes as a teacher and mentor. Plaintiff has not introduced any evidence to suggest that Plaintiff's gender or these attributes of Plaintiff were relied on in Defendant's decision to deny Plaintiff tenure. Rather, as set out above, the record evidence relating to the decision to deny Plaintiff tenure indicates that Tall, Silverstein, and Cole found that the quality of Plaintiff's publications and research papers was insufficient to merit tenure and that they were not sufficiently impressed with the letters from outside referees who were asked to evaluate Plaintiff's candidacy for tenure. Although Plaintiff argues that, contrary to the opinions of Tall, Silverstein and Cole, her research and the letters recommending her for tenure were strong, for a

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[7] While neither of these cases is a Fed.R.Civ.P. 56 case, the Court notes that *Galdieri-Ambrosini* is a Fed.R.Civ.P. 50 case, and because the standards for granting a motion for a judgment as a matter of law are very similar to the standards for summary judgment, *see, e.g., Sir Speedy, Inc. v. L & P Graphics, Inc.,* 957 F.2d 1033, 1038-39 (2d Cir.1992), *Galdieri-Ambrosini* should apply equally in the summary judgment context.

plaintiff to succeed in carrying her burden of persuasion in a tenure case, she "must show more than a denial of tenure in the context of disagreement about the scholarly merits of the candidate's academic work, the candidate's teaching abilities or the academic needs of the department or university." *Zahorik,* 729 F.2d at 94; *Batra,* 1998 WL 684621, at *7-*8; *Feinson v. New School for Social Research,* No. 95 Civ. 763, 1997 WL 742532, at *10 (S.D.N.Y. Dec. 1, 1997); *Rosen v. Columbia Univ.,* 1995 WL 464991, at *7 (S.D.N.Y. Aug. 3, 1995), *aff'd,* 101 F.3d 108 (2d Cir.1996). Absent evidence that such disagreements are motivated by invidious considerations such as gender, "universities are free to establish departmental priorities, to set their own required levels of academic potential and achievement and to act upon the good faith judgments of their departmental faculties or reviewing authorities." *Zahorik,* 729 F.2d at 94; *Batra,* 1998 WL 684621, at *7-*8; *Feinson,* 1997 WL 742532, at *10. At the pretext stage, "[t]he issue . . . is not plaintiff's views of [her] own qualifications, but whether defendant's stated reasons were pretextual." *See Rosen,* 1995 WL 464991, at *7 (quoting *Obradovich v. New York City Bd. Of Ed.,* 1993 WL 97307, at *4 (S.D.N.Y. March 31, 1993)). As a result, Plaintiff's allegations that she was referred to by her first name and described as "nice" or "nurturing," without evidence that Defendant relied on her gender or these attributes in deciding not to grant her tenure, fail to present an issue of fact with respect to the pretextual nature of defendant's stated, non-discriminatory reason for denying Plaintiff tenure.

2. Standard for Tenure

According to Defendant, the standard for quality of research that is accepted for tenure candidates from Barnard and Columbia is identical, although a lower level of productivity in research and publication is accepted from Barnard candidates because there is a heavier teaching load at Barnard. *See* Rupp Dep. at 233; Silverstein Dep. at 23; Sovern Dep. at 17, 39-40; Cole Dep. at 296-97. President Futter likewise stated that she believed there were no differences in criteria as to the academic qualifications of Barnard and Columbia tenure candidates. *See* Futter Dep. at 26. Plaintiff, however, disagrees and argues that Columbia applied a more stringent standard to her tenure candidacy than it did to male Barnard candidates in the hard sciences,[8] by holding her to the same standard for tenure as a Columbia candidate for tenure, thereby demonstrating bias. Plaintiff's only support for this argument, however, is her assertion that a year after she was denied tenure, Columbia granted tenure to a Barnard faculty member in the Physics Department, Timothy Haplin-Healy, whose research, according to Plaintiff, was below the standard that would be expected for the counterpart department at Columbia. Plaintiff provides no support for this assertion, however, other than evidence that an unidentified member of Haplin-Healy's ad hoc committee apparently expressed this opinion of his research during the ad hoc meeting. *See* Cole Dep. at 527; Vladeck Aff., Exh. EE. There is no evidence that any other member of the ad hoc committee

[8] Plaintiff defines the hard sciences to include the departments of biology, chemistry, mathematics, and physics.

shared this view of his research and, indeed, the committee voted unanimously in favor of granting Haplin-Healy tenure. Thus, Plaintiff's allegation that Columbia applied a more stringent standard to her tenure candidacy than it did to male Barnard candidates will not suffice to create a material issue of fact.

Plaintiff also points out that faculty members from Columbia and Barnard testified that some tenured members of the Barnard faculty would not have received tenure at Columbia, *see* Breslow Dep. at 95, 149-50; Chapman Dep. at 242, and argues that this supports her claim that a more stringent standard was applied to her tenure candidacy than to male candidates. However, there is no suggestion that gender played any role in these tenure decisions. Allegations relating to inter-institutional politics between Barnard and Columbia that have nothing to do with gender do not support Plaintiff's claims of discrimination. As noted above, "discrimination does not lurk behind every inaccurate statement. Individual decision-makers may intentionally dissemble in order to hide a reason that is non-discriminatory but unbecoming or small-minded, such as . . . institutional politics, envy, nepotism, spite or personal hostility." *Fisher,* 114 F.3d at 1337. Thus, Plaintiff's allegations, even if true, do not present a question of fact regarding Defendant's stated non-discriminatory reason for denying Plaintiff tenure.

3. Procedural Irregularities and Columbia's Justifications for denying Plaintiff Tenure

Plaintiff next alleges that there were a series of procedural irregularities in her tenure process from which a jury could infer pretext and bias. Plaintiff claims that Tall's phone calls to the other members of the ad hoc

committee prior to the committee meeting were improper, and that Provost Cole's investigation subsequent to the ad hoc meeting and his failure to share that additional information with the ad hoc members evidence bias and pretext.[9] Although it is unclear that any of the above constitute procedural irregularities, assuming that they do, there is simply no evidence that Plaintiff's sex played any role in the above alleged irregularities. Plaintiff's sex alone cannot suffice to transform any irregularity into a pretext for discrimination. Thus, Plaintiff's allegations regarding procedural irregularities do not support an inference that Defendant's stated reason for denying Plaintiff tenure was a pretext for discrimination.

Plaintiff additionally claims that discrimination can be inferred from Defendant's shifting explanations for denying Plaintiff tenure. Although shifting explanations may be evidence of pretext, *see Schmitz v. St. Regis Paper co.*, 811 F.2d 131, 132-33 (2d Cir.1987), in this case, the Court finds no evidence of shifting justifications from which a reasonable inference of discrimination can be drawn. Plaintiff offers as evidence of shifting justifications the letter sent May 26, 1993, from Provost Cole's office incorrectly stating that the ad hoc committee did not

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[9] Plaintiff also takes issue with the qualifications of Tall and Silverstein to be members of Plaintiff's ad hoc committee, claiming that both were insufficiently knowledgeable regarding Barnard to judge a Barnard candidate for tenure. Plaintiff fails to provide any support for this argument, however. Plaintiff further alleges that discrimination may be inferred from Provost Cole's contacting Breslow for additional information because "a jury could believe that Cole went to Breslow because he thought he could count on him to provide support for denying tenure." Pl.'s Mem. of Law at 17. Again, Plaintiff failes to provide any support for this allegation.

recommend in favor of granting Plaintiff tenure. However, the record is clear that Provost Cole sent a letter to President Futter dated June 7, 1993, stating that the May 26 letter was incorrect and stating that he made the decision to recommend against granting Plaintiff tenure and offering to meet with Plaintiff to discuss the reasons for his decision. *See* Vladeck Aff., Exh. QQ. Thus, it is unclear how the May 26, 1993 letter is evidence of shifting explanations for denying Plaintiff tenure.[10]

In sum, Plaintiff has not produced any evidence to support a finding that a triable issue of fact exists with respect to the pretextual nature of Defendant's stated legitimate, non-discriminatory reason for denying Plaintiff tenure. Summary judgment is therefore appropriate for Defendant.

Conclusion

For the reasons discussed above, Defendant's motion for summary judgment is granted in its entirety. The Court orders this case closed and removed from the Court's active docket.

SO ORDERED.

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[10] Plaintiff's contention that Provost Cole's explanations shifted because, during the course of his deposition, he at one time stated that the quality of Plaintiff's research was the "entire reason" for denying her tenure and later stated that the quality of her research was the "dominant factor" is equally unavailing to permit a reasonable inference of discrimination.

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GENERAL DOCKET FOR
Second Circuit Court of Appeals

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Weinstock v. Columbia University
Appeal from: U.S. District Court SDNY

Case type information:
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Supreme Court, U.S.
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02-1524

IN THE

Supreme Court of the United States

SHELLEY WEINSTOCK,

Petitioner,

—v.—

COLUMBIA UNIVERSITY,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Columbia University proffered a legitimate, nondiscriminatory reason for not granting petitioner tenure, and the Second Circuit determined upon a thorough review of the record that no reasonable fact-finder could find this reason was not the true reason, or intentional sex discrimination. If this determination was correct, the grant of summary judgment to Columbia was required by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Does the Second Circuit's fact-bound determination that petitioner failed to submit evidence from which a jury could have found pretext warrant this Court's review?

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JURISDICTION

The judgment of the Second Circuit *en banc* denying rehearing was entered on January 17, 2003. The petition for a writ of *certiorari* was filed on April 17, 2003. On April 30, 2003, the Court extended the time to respond to the petition until June 20, 2003. The jurisdiction of this Court was properly invoked under 28 U.S.C. § 1254(1) (2003).

COUNTER-STATEMENT OF THE CASE

1. Petitioner was employed by Barnard College, an affiliate of Columbia University, as an Assistant Professor in its Chemistry Department from July 1985 to June 1994. (App. 2.)[1] She was reviewed for tenure during the spring of 1993 and learned that Columbia had denied her tenure in May 1993. (App. 2, 6.)

As required by an affiliation agreement between Columbia and Barnard, petitioner could only have been granted tenure if, following earlier steps in the process, all the following occurred: (i) she received a favorable recommendation of a five-person *ad hoc* committee selected and convened by Columbia's Provost, Jonathan Cole; (ii) Provost Cole accepted that review; (iii) Columbia's President at the time, Michael Sovern, followed Provost Cole's advice to accept that review; and, finally, (iv) the Trustees of Barnard and Columbia granted tenure. (App. 2, 3.)

With Barnard's Dean, Robert McCaughey, and Provost Cole attending, the following *ad hoc* committee members met on April 12, 1993 to discuss petitioner's candidacy: (i) Professor Alan Tall, of Columbia's Department of Medicine, whom Cole also designated as the committee's Chair; (ii) Professor Samuel Silverstein, Chair of Columbia's Department of Physiology and Cellular Biophysics;

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[1] "App." refers to page numbers of the Appendix to the Petition. "Pet." refers to the Petition for Writ of *Certiorari* in this case.

(iii) Professor Zanvil Cohn of Rockefeller University; (iv) Professor Lila Braine of Barnard's Department of Psychology; and (v) Professor Paul Hertz of Barnard's Department of Biological Sciences. (App. 3-4.)

After Provost Cole reminded the *ad hoc* committee that the standards for tenure at Columbia were high because Columbia is an internationally renowned research university, Professor Sally Chapman, the Chair of Barnard's Chemistry Department, presented petitioner's case for tenure. (App. 4.) That the quality of research for both Columbia and Barnard professors must be uniform is undisputed by Barnard's President, Ellen Futter, and Columbia's former and current Presidents, Michael Sovern and George Rupp. (App. 20.)

Tall and Silverstein deemed petitioner's publications and research papers insufficient to merit tenure. (App. 4.) In their depositions, they testified that her research lacked originality and that the journals in which she published were not first-tier scientific journals. (*Id.*) Tall and Silverstein were also unimpressed with petitioner's letters of recommendation. (*Id.*) Silverstein noted that the letters were lukewarm by comparison to letters he had examined in other tenure reviews. (App. 4-5.)

The committee eventually voted 3-2 in favor of granting tenure. (App. 5.) Braine, Hertz, and Cohn voted for tenure; Tall and Silverstein voted against it. (*Id.*) A 3-2 favorable vote is considered "underwhelming [in terms of] support," according to Columbia's President, George Rupp. (*Id.*) From 1989 to the present, at least six candidates (five male, one female) were not granted tenure after a 3-2 *ad hoc* committee vote in favor of the grant. (*Id.*)

The decision to accept or reject the committee's vote moved to Provost Cole's desk. (*Id.*) Before Provost Cole made his decision, he contacted Ronald Breslow of Columbia's Chemistry Department for his insights. (*Id.*) Breslow stated bluntly that, measured by intellectual strength and scientific ability, petitioner was not in the

same league as other tenured members of Barnard's Chemistry Department. (*Id.*)

Provost Cole also discussed petitioner's candidacy with the Chair of Columbia's Chemistry Department, Richard Bersohn. (*Id.*) Cole learned from these inquiries, as well as from a previous inquiry of Bersohn by Columbia's Associate Provost, Stephen Rittenberg, that: (i) the general sentiment of the Columbia Chemistry Department was that petitioner's work was unimaginative and that her publication record was weak; (ii) the Columbia Department did not deem her worthy of tenure; but (iii) the Columbia Department had earlier voted to recommend her for tenure as a courtesy to their counterpart department at Barnard. (*Id.*)

Provost Cole eventually recommended against tenure because he felt that petitioner's scholarship was not up to Columbia's standards. (*Id.*) Columbia's President Sovern, who followed provostial recommendations on tenure as a matter of course, accepted Provost Cole's recommendation and denied tenure. (App. 6.)

Provost Cole's written explanation of his decision noted that: (i) a favorable 3-2 vote was not a strong endorsement; (ii) the two Columbia members of the committee, Tall and Silverstein, felt that petitioner's research was limited and below the quality expected of a candidate for tenure; (iii) candidates from Columbia and Barnard were to be judged for tenure by the same standards; (iv) Cohn, the outside member of the *ad hoc* committee, had stated that petitioner would not receive tenure at a research university such as Columbia even though he thought that her research was adequate for an institution such as Barnard; and (v) Provost Cole had collected evaluations from Breslow and Bersohn confirming his assessment that petitioner did not merit tenure. (App. 6-7.)

2. In February 1995, petitioner filed a complaint in the United States District Court for the Southern District of New York alleging that Columbia's denial of tenure

violated, *inter alia*, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (2003). Columbia moved for summary judgment upon completion of discovery. On July 28, 1999, the district court granted the motion, concluding that petitioner had failed to establish a triable issue of fact as to the pretextual nature of Columbia's legitimate, nondiscriminatory reason for denying her tenure. (App. 53-77.)

On August 23, 2000 the Second Circuit affirmed the district court's grant of summary judgment on essentially the same grounds. (App. 1-52.) The Second Circuit concluded that petitioner failed to produce evidence sufficient to support a rational finding that the legitimate, nondiscriminatory reason proffered by Columbia for not granting tenure – that she did not meet the standard for scholarship uniformly applicable within the University – was false. The Court also held that there was insufficient evidence to permit a finding that "more likely than not [discrimination] was the real reason." (App. 13, 29, relying on *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S 133, 148 (2000).) Before reaching this conclusion, the Second Circuit's thirty-page majority opinion analyzed in great detail all the factual issues petitioner seeks to have this Court examine, including the allegations of gender stereotyping, procedural irregularities, and disparate treatment. On every issue, responding at length to a dissent, the Second Circuit found a lack of any admissible evidence that would call into question Columbia's proffered nondiscriminatory reason for denying petitioner tenure, or support a reasonable finding of intentional sex discrimination.

On January 17, 2003, without dissent, the Second Circuit denied the petition for rehearing and rehearing *en banc*. (App. 78.)

REASONS FOR DENYING THE WRIT

The Second Circuit's decision rested squarely upon a thorough analysis of the admissible record evidence in accordance with basic and long-established standards under Federal Rule of Civil Procedure 56. Even if petitioner was correct about conflicts existing between the circuits – and she is not – this case does not present them. Nor does this case present any occasion for further elucidation of the legal principles explored or clarified in *Reeves*.

Columbia proffered what petitioner concedes would, if believed, be a legitimate, nondiscriminatory reason for not granting her tenure: that she did not meet the standard for scholarship uniformly applicable within the University. (Pet. 8; App. 13.) The Second Circuit held correctly that petitioner failed to produce sufficient admissible evidence from which a reasonable fact-finder could conclude this reason was not the true reason, or that intentional sex discrimination had played any role. (App. 13, 29.) As a result, the dismissal of her claim was mandated as a matter of law. *E.g., McDonnell Douglas*, 411 U.S. at 807.

The Second Circuit's detailed analysis revealed petitioner's factual assertions to be so weak that the Second Circuit recognized no need "to tarry on the question of how much evidence is necessary to find pretext." (App. 13 n.2.) *Reeves* made plain that "[w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors" in the factual record, including "the probative value of the proof [if any] that the employer's explanation is false." 530 U.S. at 148-49. Here, the two courts below carefully applied those factors, and the fact-bound conclusion that this case falls in the "judgment for defendant as a matter of law" category rather than the "disputed issues for trial" category presents no occasion for this Court's review.

Reeves differed from this case in that the plaintiff there proffered sufficient evidence to meet his pretext burden.[2] *Reeves* thus presented this Court an opportunity to resolve a conflict among the circuits as to whether meeting the pretext burden was alone "adequate to sustain a finding of liability for intentional discrimination," 530 U.S. at 140. That issue is not presented here, where both lower courts held that plaintiffs did *not* submit evidence sufficient, under Rule 56, to permit a reasonable finding that the proffered reason was not the true reason. (App. 29, 77.)[3]

Moreover, even if petitioner's proffer of evidence was construed over-generously as meeting her pretext burden, this would still be, as the Second Circuit held (App. 13, 29), one of the "instances" *Reeves* recognized in which summary judgment was appropriate because petitioner "created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." 530 U.S. at 148.

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[2] *Reeves* recognized that there are "appropriate circumstances" under which it could reasonably be inferred "from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." 530 U.S. at 147. On the other hand, *Reeves* emphasized that "[c]ertainly there will be instances where . . . no rational factfinder could conclude that the action was discriminatory," such as "if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.* at 148.

[3] The decision below was fully consistent with this Court's most recent Title VII decision, *Desert Palace, Inc. v. Costa*, __ U.S.__, No. 02-679, 2003 U.S. LEXIS 4422 (June 9, 2003), since petitioner presented insufficient evidence from which pretext could reasonably be inferred and no evidence of discrimination.

Because the conflicts alleged by petitioner either do not exist or are not presented by the decision below, or both, this case presents no legal issues warranting this Court's review. Any review would instead necessarily focus upon reconsideration of the Second Circuit's detailed determinations concerning whether the totality of evidence presented on various issues would permit findings of pretext (that is, warrant disbelief in Columbia's proffered reason) or of sex discrimination – the kind of review that even petitioner acknowledges does not warrant this Court's attention. (Pet. 10.)[4]

Petitioner only highlights the fact-bound nature of the Second Circuit's determinations by seeking to discredit these determinations through assertions of fact that lacked admissible evidentiary support even when assessed in the light most favorable to petitioner under Federal Rule of Civil Procedure 56:

- petitioner's assertion that anyone on the *ad hoc* committee referred to petitioner as "nurturing" lacked admissible substantiation (*compare* App. 16 *with* Pet. 4, 7, 20);
- "statistical evidence" of other tenure decisions was not part of the record because it was only "culled from an amicus brief and never presented to the district court or on appeal" (*compare* App. 21-22 *with* Pet. 7, 9, 23);

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[4] Petitioner suggests incorrectly that the Second Circuit drew distinctions between direct and circumstantial evidence when analyzing whether petitioner presented sufficient evidence of procedural irregularities, changes in qualification requirements, and biased comments to survive summary judgment. (Pet. 12, 16, and 20-22.) The Second Circuit made no such distinctions. Indeed, the Second Circuit did not even mention "direct" or "circumstantial" evidence in connection with the first two issues (App. 18-22) and, in connection with the third, merely noted that petitioner "failed to offer any direct evidence *or any testimony*" that a biased comment was made. (App. 16, *emphasis added.*)

- it was not "so rare" for Columbia to not grant tenure after a 3-2 *ad hoc* committee vote in favor of the grant because such a vote is considered "underwhelming in terms of support," and, from 1989 to 2000, at least six tenure candidates (five male, one female) were denied tenure after such a vote (*compare* App. 4, 6, 14 *with* Pet. 5);
- there was no basis in the record for petitioner's assertion that the tenure standards were subsequently lowered for a male Barnard professor (*compare* App. 28 *with* Pet. 6, 14, 15, 17); and
- as a corollary to the last two examples, there was no basis in the record for petitioner's assertion that Columbia "changed the rules" by "rais[ing] the bar" for tenure (*compare* App. 28 *with* Pet. 7, 8, 14).

In short, even if there were conflicts among the circuits regarding either what kinds of evidence permit a finding of pretext (that is, warrant a fact-finder's disbelief of the proffered legitimate reason) or what happens subsequent to a pretext finding – and there are not – this would not be the appropriate case in which to address those conflicts.

The question the petition proposes – "What is evidence of pretext?" – has a simple, long-established answer on which there is no circuit split whatever: evidence of pretext is *any* admissible evidence that would permit a fact-finder to reasonably conclude that the proffered reason is not the true reason. *See, e.g., Reeves*, 530 U.S. at 143 (quoting *Texas Dep't of Community Affairs v. Burdine*, 45 U.S. 240, 253 (1981)). There is no reason to believe that a better answer can be supplied, and nothing in the Second Circuit's decision suggests that it disagrees with any other circuit on this point.

The Court's central insight in *Reeves* – that a *prima facie* case plus pretext may, but will not always, be sufficient to allow a discrimination plaintiff to reach a jury, thus making judgment on the record, rather than by simplistic

formulas, inescapable – applies here as well. Far from conflicting on that point, all the circuits agree that the factors on which petitioner focuses (characterizations, departures from procedure, background statistics) may, but do not always, warrant disbelief in a proffered justification for a job action.

Because the Second Circuit and other circuits agree on the need for contextual judgment rather than rigid categorical rules in assessing whether a plaintiff has submitted evidence of "pretext," petitioner's "what is evidence of pretext" question raises no issue meriting review.

The additional question petitioner smuggled into Point V of her petition (but omitted from her Question Presented) is not worthy of review either. There is no circuit conflict over how to read and apply the central holding of *Reeves* that evidence of pretext, together with the *prima facie* case, will be sufficient in some cases and insufficient in others to permit an ultimate finding of discrimination. No circuit has deviated from *Reeves'* insistence on a case-by-case fact-intensive approach and instead mandated *per se* rules for the categorical treatment of varying types of evidence. The *per se* rules petitioner seeks to impose on the post-*Reeves* caselaw to gin up a conflict simply do not exist.

I. THIS CASE PRESENTS NO CIRCUIT CONFLICT ON WHETHER IRREGULARITIES IN EMPLOYER PROCEDURES ALWAYS AND NECESSARILY EVIDENCE PRETEXT.

A. The Second and the Other Circuits Agree that a Procedural Irregularity May, But Will Not Invariably, Warrant Reasonable Disbelief of an Employer's Proffered Explanation.

Petitioner's assertion that there is "a 5-3 circuit split on whether procedural irregularities *per se* may support an inference of discrimination" is false. (Pet. 12.) No circuit has a *per se* rule based on the simple fact that evidence exists of a procedural irregularity. Such a rule would be

absurd, because there are clearly numerous types of minor or easily explained procedural irregularities – especially those like the ones here that take place at a far remove from the actual decision-maker – that no reasonable fact-finder could possibly conclude evince pretext or intentional discrimination. Instead, all the circuits have consistently chosen a middle, *Reeves*-like path: a fact-intensive examination of whether the circumstances of the procedural irregularity in relationship to the alleged intentional discrimination warrant disbelief in the proffered explanation.

As petitioner acknowledges, the Second Circuit applied this standard here, explicitly recognizing that a procedural irregularity can raise an inference of discrimination where such a link exists. (App. 18; Pet. 12.) In this context, the Second Circuit explained in great detail why Cole's delay in releasing his written explanation of petitioner's tenure denial and Tall's expressions of concern about petitioner's research in his initial telephone calls to committee members did not reasonably give rise to a discriminatory inference that the Provost's decision to deny tenure was based on reason other than the one he gave. In light of the disconnect between the decisionmaker (and his decision) and the asserted procedural irregularities, the courts below simply and correctly concluded that the facts offered here did not permit any finding of pretext, that is, that Provost Cole's proffered reason for denying tenure was not the true reason.

This is the same standard as is applied by the five circuits wrongly said by petitioner to conflict with the Second Circuit on the issue. For example, in a case subsequent to the one that petitioner cites, the Fifth Circuit expressly limited when discrimination may be inferred from a procedural departure to "appropriate circumstances" in which the departure is "conscious and unexplained" and plaintiff "establishes some nexus" between it and the alleged discriminatory animus. *Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379, 396-97 (5th Cir. 2002). *See also J.R.*

Ridgley Wyvill v. United Companies Life Ins. Co., 212 F.3d 296, 305 (5th Cir. 2000) (vacating plaintiffs' jury verdict because, *inter alia,* they "put forth no evidence that would create a nexus between [the employer's deviation from procedure through] file-building and the plaintiffs' ages"), *cert. denied,* 531 U.S. 1145 (2001). [5]

Similarly, the Second Circuit's approach does not conflict with the approaches of the other four circuits petitioner mischaracterizes as having a *per se* rule mandating an inference of pretext, including:

- 10th Cir. – *see, e.g., English v. Colo. Dep't of Corr.*, 248 F.3d 1002, 1010 (2001) (pretext could not reasonably be inferred because plaintiff did not "show some nexus" between his termination and the decision-maker's investigation of reported racial epithets);
- 11th Cir. – *see, e.g., Bass v. Bd. of County Comm'rs*, 256 F.3d 1095, 1108 (2001) (employer's violation of its normal hiring procedure "may be," but is not automatically, evidence of pretext where "other facts surrounding the interview process . . . indicate that the process was suspect" and the employer "disregard[ed] all but one of the factors and qualifications generally taken into consideration");
- 9th Cir. – *see, e.g., Pottenger v. Potlatch Corp.*, No. 02-35235, 2003 U.S. App. LEXIS 9562, at *12 (May 19, 2003) (pretext could not reasonably be inferred from alleged procedural deviations in how quickly plaintiff's

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[5] Even the Fifth Circuit case petitioner cites comes nowhere near establishing a *per se* rule, but instead relies upon a clear nexus between the procedural deviation and the adverse employment action. *See Blow v. City of San Antonio*, 236 F.3d 293, 297 (5th Cir. 2001). Unlike here, San Antonio's sole purported non-discriminatory reason for failing to promote plaintiff – the lateness of her application – could not have existed but for defendant's deviation from written hiring procedures. *Id.*

termination was decided upon and the manner in which he was discharged); and

- D.C. Cir. – *see, e.g., Jones v. Washington Metro. Area Transit Auth.*, 205 F.3d 428, 434 (2000) (pre-*Reeves* holding that "it was not clearly erroneous" to find pretext based on three factors, one of which was a procedural irregularity with a direct nexus to the termination).

The two circuits that petitioner cites as being aligned with the Second Circuit also reject a *per se* rule in favor of an "all the facts and circumstances" *Reeves*–type approach – a nexus approach – when analyzing assertions of procedural irregularities. *See Dugan v. Albermarle County Sch. Bd.*, 293 F.3d 716, 722 (4th Cir. 2002) ("The issue is whether [the supervisor's] failure to apply the RIF policy was due to legitimate pedagogical concerns or his discriminatory animus toward [plaintiff]."); *Stewart v. Henderson*, 207 F.3d 374, 378 (7th Cir. 2000) (pretext could not reasonably be inferred from committee's failure to follow all aspects of procedure for reviewing written applications because "all the evidence indicates that the review committee believed it was implementing [the procedure] in recommending the candidates").[6]

B. Neither the Second Nor Any Other Circuit Has a *Per se* Rule that a Change In Qualification Requirements Either Does or Does Not Raise an Inference of Unlawful Discrimination.

The Second Circuit's well-supported determination that petitioner had presented no admissible evidence that the qualification requirements for the tenured position she

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[6] *See also Geddis v. Univ. of Del.*, 40 Fed. Appx. 650, 652-53 (3d Cir. 2002) (affirming summary judgment dismissing race and gender discrimination claims and finding no pretext despite plaintiff's evidence that University did not follow its standard procedures).

sought had changed (App. 20-22, 28) makes this case an inappropriate vehicle for addressing the consequences of an employer's change in qualifications.

Moreover, contrary to petitioner's assertion (Petition Point IB), the circuits are not in conflict on the issue. The mere mention of petitioner's argument in the stark terms of the above heading reveals its implausibility. Without examining the reasons for and other circumstances surrounding an employer's change in qualification requirements, no court could determine whether the change raises a discriminatory inference. For example, discrimination could not reasonably be inferred from a change in qualification requirements that was mandated by a change in the law, regardless of whether the change resulted in disparate treatment between a man and woman.

Not surprisingly, the suggestion that the Second and Fifth Circuits on the one hand, and five different circuits on the other, apply different "rules" on this point is entirely baseless:

- The decision below did not announce or apply any *per se* rule applicable to a showing of changed qualification requirements; and even if the Second Circuit had announced such a rule it would have been dicta, given its unequivocal holding that there was no evidence that Columbia had changed its qualification requirements for tenure (App. 20-22); and
- *Forman v. Small*, 271 F.3d 285, 293 (D.C. Cir. 2001), held that the dropping from later promotion decisions of a requirement that a book be completed failed to support pretext, not because of any *per se* rule, but "because the later promotion decisions occurred under different decision makers using different procedures, having different priorities, and considering different performance evaluations," *cert. denied*, 536 U.S. 958 (2002).

Similarly, none of the five decisions that petitioner asserts are on her side of the illusory "rule" schism reflect a *per se* rule. *See Goosby v. Johnson & Johnson Med., Inc.*, 228 F.3d 313, 320 (3d Cir. 2000); *Montemayor v. City of San Antonio*, 276 F.3d 687, 691 (5th Cir. 2001); *Curry v. Menard, Inc.*, 270 F.3d 473, 479-80 (7th Cir. 2001); *Dodoo v. Seagate Tech., Inc.*, 235 F.3d 522, 530 (10th Cir. 2000); *Sledge v. Goodyear Dunlop Tires N. Am., Ltd.*, 275 F.3d 1014, 1020 (11th Cir. 2001). All of them instead hinge upon fact-bound analyses of the degrees to which the plaintiffs' proffered evidence might reasonably be construed as evincing discrimination or at least the falsity of the employers' justifications for their actions. *Id.* Indeed, none of these decisions even involves the type of factual scenario – a change in qualification requirements – that petitioner mistakenly argues supports her case. *Id.*

II. THE SECOND AND THE OTHER CIRCUITS DO NOT APPLY GREATER DEFERENCE TO THE TENURE DECISIONS OF ACADEMIC INSTITUTIONS.

The Second Circuit did not say that it was according special deference to tenure decisions, and did not do so. Its statement that "[w]hen a college or university denies tenure for a valid, non-discriminatory reason, and there is no evidence of discriminatory intent, this Court will not second-guess that decision" (App. 13) evinces no such policy. This statement would be equally true if "a college" was replaced by "any employer" and "tenure" was replaced by "any job benefit."

Thus, the decision below does not conflict with the decisions petitioner cites from other circuits that also do not accord special deference to the tenure decisions of academic institutions.

III. THIS CASE PRESENTS NO CIRCUIT CONFLICT ON THE WEIGHT THAT MIGHT BE GIVEN TO BIASED REMARKS, AS NO REASONABLE FACT-FINDER COULD HAVE FOUND ANY HAD BEEN MADE.

The Second Circuit held correctly that petitioner presented no evidence of "biased comments" that could support a jury's finding that Columbia's reason for not granting petitioner tenure was pretextual or that the decision was the product of intentional sex discrimination, for three reasons.

First, petitioner presented insufficient evidence to permit a finding that statements characterizing petitioner (or other women) as "nurturing" had been made. (*Compare* App. 16 *with* Pet. 4, 7, 20-21.) Thus, the issue of whether that statement may be evidence of pretext cannot be resolved in this case. Second, references to petitioner as "nice" did not evince sex discrimination, and could equally well be viewed as a positive factor in the evaluation of her teaching performance. (App. 17-18.) Third, there was "no evidence" that the comments petitioner relied upon "were ever used to describe [petitioner's] quotidian research, which was the proffered non-discriminatory reason for Columbia's decision to deny her tenure." (App. 18.) Accordingly, this case does not present the issue of when pretext or even discrimination may be inferred from remarks that could reasonably have been found to be biased.[7]

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[7] The comments by Breslow on which petitioner relies (Pet. 20-21), about petitioner being not aggressive, not tough, and a pushover, have an even clearer lack of connection to the tenure decision, because he was never a part of the *ad hoc* committee and he volunteered these comments after its deliberations. (*Compare* App. 5 *with* App. 40.) The record was undisputed that Provost Cole made the relevant tenure decision. (App. 6.) In the context of the overall message Breslow was conveying –

Nor is there any circuit conflict on this issue. The Second Circuit did not hold or even suggest in this case that biased remarks can never be considered as evidence from which pretext or discrimination may be inferred if they do not relate to the employer's stated reason for the adverse action (*compare* App. 15-18 *with* Pet. 21) and has never so held in any previous decision. Indeed, the Second Circuit has frequently held that biased comments, under appropriate circumstances, justified such inferences. *See, e.g., Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 468 (2d Cir.) (when numerous references to older pilots as "contaminated" and "Bad Apples" are "viewed against the background of Delta's all-consuming interest in the age and projected retirement rates of the Pan Am pilots, they inescapably lead to the conclusion that Delta's actions may indeed have been motivated by age-based animus"), *cert. denied,* 534 U.S. 993 (2001); *Owens v. New York City Hous. Auth.*, 934 F.2d 405, 410 (2d Cir. 1991) (references to plaintiff's age "raise a genuine issue of fact on the issue of pretextuality" because, even though they "were not numerous," they were made by supervisors "responsible for the vast majority of the disciplinary charges brought against her"). Not surprisingly, the cases petitioner offers for having so held in other circuits (Pet. 21-22) do not disagree with the Second Circuit or each other on this point. *See, e.g., Manning v. Chevron Chem. Co.*, __ F.3d __, No. 01-41222, 2003 U.S. App. LEXIS 11679, at *21 (5th Cir. June 13, 2003) (alleged discriminatory comments were not evidence of pretext because they were not "proximate in time to the employment action" or "related to the employment decision at issue").

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petitioner was not in the same league as other tenured members of the Barnard Chemistry Department, measured by intellectual strength and scientific ability – these comments also could not support a verdict that the Provost discriminated against petitioner on account of sex discrimination. (App. 5; Pet. 5.)

IV. THIS CASE PRESENTS NO CIRCUIT CONFLICT ON THE RELEVANCE OF "BACKGROUND STATISTICS," AS NONE WERE PART OF THE SUMMARY JUDGMENT.

The Second Circuit was not – and this Court is not – presented with the issue of whether an employer's workforce composition may ever be relevant background evidence. Nor did the Second Circuit hold, as petitioner suggests, that "any and all numbers" could never be relevant "insofar as they addressed discrimination against women other than Petitioner." (*Compare* Pet. 23 *with* App. 21-22.)

Instead, since the statistics petitioner points to were merely "culled from an *amicus* brief and never presented to the district court or on appeal" (App. 21), the Second Circuit properly held that the asserted "statistical evidence" was "simply not part of the record" (App. 21-22) and for that reason irrelevant. This case therefore presents no question concerning the admissibility or relevance of such evidence when properly presented under Rule 56 or at trial.

Nor does the alleged circuit split exist. The Second Circuit has not held in this or any other case that such statistics are automatically irrelevant (if offered). To the contrary, the Second Circuit has often recognized circumstances in which statistics about an employer's workforce composition is relevant background evidence. *See, e.g., Stratton v. Dep't for the Aging*, 132 F.3d 869, 877 (2d Cir. 1997); *Luciano v. Olsten Corp.*, 110 F.3d 210, 217-18 (2d Cir. 1997).

Similarly, the other two circuit decisions that petitioner cites as holding that such statistics are irrelevant *per se* say no such thing. Both decisions emphasize that statistical evidence may or may not be relevant to a pretext analysis depending on various factors, including whether variables other than the protected classification were accounted for in the statistics and whether the statistics analyzed the

treatment of comparable employees. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1283 (9th Cir. 2000) ("Because they fail to account for many factors pertinent to [plaintiff], we conclude that the statistics are not enough to take this case to trial."), *cert. denied*, 533 U.S. 950 (2001); *Bogren v. Minnesota*, 236 F.3d 399, 406 (8th Cir. 2000) (citing and quoting *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 777-78 (8th Cir. 1995) ("statistical evidence 'may support a finding of pretext'" under certain circumstances, including "when it analyzes the treatment of comparable employees"), *cert. denied*, 534 U.S. 816 (2001).

V. PETITIONER FAILED TO MEET HER PRETEXT BURDEN, SO WHAT MIGHT HAVE HAPPENED IF SHE DID IS IRRELEVANT.

In Point V, although not in the question presented, petitioner suggests that this case presents an appropriate opportunity for this Court to proceed past the point it stopped at in *Reeves* and provide further guidance on when circumstances, plus pretext, warrant summary judgment. It presents no such occasion, not least because the Second Circuit held correctly that petitioner failed to produce sufficient admissible evidence from which a reasonable fact-finder could conclude that Columbia's proffered reason for not granting her tenure was false. (App. 29.) Without pretext, any discussion of what might happen post-pretext can only be hypothetical.

Moreover, the conflict petitioner asserts is illusory. No circuit has deviated from *Reeves'* insistence that a fact-intensive approach, rather than a *per se* rule, must govern determinations about whether judgment as a matter of law is appropriate post-pretext. Instead, every circuit has paid careful heed to whether the facts of each case present what *Reeves* described as either: (i) the "appropriate circumstances" under which it could reasonably be inferred "from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose"; or (ii) the "instances

where . . . no rational factfinder could conclude that the action was discriminatory." *Reeves*, 530 U.S. at 147-48.

CONCLUSION

For all the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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No. 02-1524

In The Supreme Court of the United States

SHELLEY WEINSTOCK,

Petitioner,

v.

COLUMBIA UNIVERSITY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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FURTHER REASONS FOR GRANTING THE PETITION

Petitioner Shelley Weinstock ("Weinstock") submits this reply to the brief in opposition to *certiorari* submitted by Respondent Columbia University ("Respondent" or "Columbia"). This reply suggests an alternative disposition: *Desert Palace, Inc. v. Costa*, ___ U.S. ___, 123 S. Ct. 2148 (2003), provides grounds for the Court to grant *certiorari*, vacate the judgment below, and remand this matter to the Second Circuit for reconsideration in light of that intervening authority.

I. *COSTA* WARRANTS A SUMMARY ORDER THAT THIS CASE BE RECONSIDERED.

In *Costa*, this Court unanimously held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, does not require plaintiffs to bring forward "direct evidence" in order to prevail. The Court focused on the text of Section 2000e-2(m), which "[o]n its face . . . does not mention, much less require, that a plaintiff make a heightened showing [of discrimination] through direct evidence." *Id.* at 2153. "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Id.* at 2154.

Before this Court's decision in *Costa*, the circuits were in disarray as to whether to withhold the burden-shifting presumption this Court developed in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), from all plaintiffs except those who could introduce overtly biased statements so closely connected to the adverse action as to support the almost inexorable conclusion that it was motivated by that very bias. The Second Circuit held that decision-makers'

descriptions of Weinstock as "nice," nurturing,[1] not aggressive, not tough, and a "pushover" could not be relevant because Columbia did not admit that those stereotypes were the reason it failed to promote her. (App. 18) The lower courts had developed that nexus requirement to distinguish between "direct evidence," sufficient to shift the burden to defendants, and "stray remarks," too disconnected from the adverse action to be probative. The Fifth Circuit has recognized that *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), throws the whole "stray remarks" jurisprudence into question. *See Evans v. City of Bishop*, 238 F.3d 586, 591 (5th Cir. 2000) (per curiam); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 229 (5th Cir. 2000). However, some circuits have resisted this necessary implication of *Reeves*.

Costa drives home *Reeves'* point that biased remarks are relevant even when they are not a direct part of the challenged action. For example, the Fourth Circuit recently reversed and remanded a grant of judgment as a matter of law that predated *Costa* on the ground that, in light of *Costa*, the district court had erred by requiring that statements reflecting discriminatory animus bear directly on the contested employment decision. *See Rowland v. American Gen. Fin., Inc.*, ___ F.3d ___, No. 01-2481, 2003 WL 21912173, at *3-5 (4th Cir. Aug. 12, 2003). Similarly, the petition should be granted, the Second Circuit judgment vacated, and the matter remanded for further proceedings consistent with *Costa*.

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[1] Columbia argues that there is no admissible evidence that the word "nurturing" was used. (Opp. 15) However, Alan Tall ("Tall"), an Ad Hoc Committee ("Ad Hoc") member, admitted that "that concept was discussed," and Samuel Silverstein ("Silverstein"), another Ad Hoc member, did not deny it, and testified that "nurturing" was a "good adjective" to describe Weinstock's "mentoring" abilities. Weinstock was told that the word "nurturing" was used at the Ad Hoc as a way of devaluing her work.

The record here is infected with biased remarks by the two Ad Hoc members who voted against tenure for Weinstock; by then-Provost Jonathan Cole ("Cole"), the ultimate decision-maker; and by others on whom Cole admitted he relied. Tall and Silverstein referred to Weinstock, whom they had never met, as "Shelley"; Paul Hertz ("Hertz"), another Ad Hoc member, testified that he believed that they referred to her by her first name and without her proper title because she was a woman. Moreover, it is uncontested that Tall and Silverstein referred to Weinstock as "nice" and in terms equivalent to nurturing; and that neither of those qualities, by those or any other name, are relevant to the tenure decision. Hertz and Professor Lila Braine ("Braine"), another Ad Hoc member, testified that those comments reflected gender bias, and a court applying the analysis mandated by *Costa* and *Price Waterhouse* could consider those statements (even if they are indirect evidence) as reflecting undue weight given to Weinstock's gender rather than her academic credentials.

After the Ad Hoc's deliberations, Cole sought out additional input from Professor Richard Breslow ("Breslow"). Breslow had previously supported Weinstock's candidacy and had submitted a letter in praise of her research; yet in this conversation, he spoke of her in terms that even Respondent cannot deny were tainted by gender stereotyping (Opp. 15 n.7), describing her as "not tough," a "pushover," and "a perfectly nice person."[2] As Judge Cardamone wrote in dissent:

> The inappropriate focus on Weinstock's 'feminine' qualities in the tenure process led Cole and perhaps others to discount her 'masculine' success as a researcher and professor. While Hopkins was punished for failing to perform a 'feminine' role, Weinstock was punished for performing it too well.

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[2] *See Price Waterhouse*, 490 U.S. at 257 (noting that it was some of Hopkins' supporters who invoked gender stereotypes during her partnership deliberations).

> The problem both Weinstock and Hopkins faced was that their employers demanded that they perform both 'masculine' and 'feminine' roles, yet perceived those roles as fundamentally incompatible. Hopkins was punished because her 'masculinity' appeared inconsistent with gendered stereotypes of how women should look and behave; Weinstock was punished because her 'femininity' appeared inconsistent with 'masculine' success as a researcher.

(App. 47) Reversal and remand is appropriate so that the Second Circuit may determine whether these stereotypes, now open for consideration under *Costa*, unlawfully influenced Columbia's decision.

II. THE OPPOSITION BRIEF MISREPRESENTS THE GROUNDS ON WHICH WEINSTOCK SEEKS *CERTIORARI*.

Columbia advances the following arguments in opposition to *certiorari*: the underlying case has its own set of facts; the circuit splits alleged do not exist; the record does not contain sufficient evidence to support this Court's consideration of the legal issues presented in the petition; and Weinstock is seeking a per se rule to govern dispositive motions in Title VII cases. None of these arguments is correct.

First, respondent argues that *certiorari* should not be granted because *Weinstock* arises out of its own particular facts. (Opp. 7) But this is always the case where the petitioner seeks review of questions relating to the relevance of evidence and burden-shifting. By Columbia's logic, this Court should not have concerned itself with *Costa*, *Reeves*, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), *Price Waterhouse, United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), or *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972). Nor is Weinstock asking this Court to determine the sufficiency of her evidence. Rather, Weinstock seeks review on the purely legal question of whether the types of

evidence she proffered are relevant to the question of pretext and therefore *may* require denial of summary judgment for employers in Title VII cases. While Weinstock believes that if her evidence on pretext were considered it would suffice to defeat summary judgment, the question on *certiorari* is whether those categories of evidence may be taken into consideration at all, not the weight to be accorded them. *Certiorari* is warranted here because the Second Circuit categorically rejected the relevance of her proofs on pretext – proofs that are commonly accepted in other federal courts.

Second, *certiorari* is warranted because the circuit splits Weinstock highlights (Pet. 11-29) represent deep and mature divisions among the circuits created because some courts consistently refuse to credit certain types of evidence, with the end result that plaintiffs are never permitted to prove pretext by those avenues. Such an unvarying practice amounts to a per se rule discounting those types of evidence, insulating academic institutions in certain jurisdictions from liability for discrimination. The Second Circuit's contention that academic institutions should somehow be shielded from rigorous application of anti-discrimination laws in the name of academic freedom (App. 13-15) runs headlong into Congress' contrary judgment. More than three decades ago, Congress repealed the exemption in Title VII for educational institutions. Equal Opportunity Act of Mar. 24, 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e-1). Nonetheless, the Second, Fifth, Seventh, Tenth, Eleventh, and District of Columbia Circuits have *never* rejected an academic institution's defense that tenure was denied due to allegedly insufficient scholarship, and hence have *never* (in a published opinion) denied summary judgment or judgment as a matter of law to a university defending a tenure decision under Title VII.[3] The universal success of that

[3] *See, e.g., Lim v. Trustees of Ind. Univ.*, 297 F.3d 575, 581 (7th Cir. 2002); *Krystek v. University of S. Miss.*, 164 F.3d 251, 257 (5th Cir. 1999); *Dasgupta v. University of Wis. Bd. of Regents*, 121 F.3d 1138,

(Continued on following page)

defense in *half* the circuits suggests that this Court's promise of "a fair opportunity to show that [the college's or university's] stated reason for [a professor's] rejection was in fact pretext," *McDonnell Douglas*, 411 U.S. at 804, is a dead letter to tenure candidates in half of our nation.

Other types of evidence are also routinely disregarded in some circuits. (Pet. 11-17, 20-24) For example, the decision below recites that procedural irregularities may be evidence of pretext if they support the inference that a biased decision-maker distorted the process to orchestrate a pre-ordained conclusion. (App. 28) However, it refused to apply that rule here, although Cole had subverted the process as follows:

- Cole began the process by appointing to the Ad Hoc two medical school professors lacking the familiarity with Barnard College required by the written Affiliation Agreement between Barnard and Columbia.
- Cole imposed a new standard devised especially for Weinstock, the first woman in the hard sciences to come up for tenure when he was Provost.
- Cole expressed his negative opinion of Weinstock at the Ad Hoc meeting in direct contravention of the written rules governing it, which required him to remain both neutral and silent.
- Cole called non-Ad Hoc members to solicit views contrary to the Ad Hoc's vote.
- Cole overturned the positive Ad Hoc vote.
- Cole delayed in submitting his required written explanation for deviating from the Ad Hoc's vote.

1141 (7th Cir. 1997); *Wu v. Thomas*, 847 F.2d 1480, 1484 (11th Cir. 1988); *Zahorik v. Cornell Univ.*, 729 F.2d 85, 93 (2d Cir. 1984); *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980).

- Cole misstated the outcome of the vote when he finally complied with the requirement to explain his decision.

(*Id.* 39-42, 44). Those facts could reasonably support a finding of pretext, yet the Second Circuit concluded that they could not have affected the ultimate outcome. That conclusion defies common sense and the record. Here, a single procedural irregularity – holding Weinstock, a Barnard candidate, to the Columbia research standard – dictated the outcome, as both respondent and the decision below concede. (Opp. 5; App. 13) Yet the record reveals sufficient proof for a jury to believe that Weinstock was alone among Barnard candidates in being measured against this heightened standard:

- The Vice Provost admitted that Cole had granted tenure to Barnard candidates who would not have received tenure at Columbia, and wrote a memorandum to Cole reminding him of his previous statements that "Various Barnard candidates would never be considered for tenure in the Columbia department" and that "*a less rigorous standard that requires less in the way of scholarship does appear to have emerged*" and, finally, that "*some candidates were not up to Columbia's standards but were fine for Barnard*" (emphasis added);
- The Dean of Barnard testified that it is not a requirement for tenure at Barnard that a candidate be qualified for tenure at Columbia, or any other research university; and
- Breslow stated that he learned of Columbia's purportedly uniform standard for Columbia and Barnard candidates in the context of the denial of tenure to Weinstock, and further doubted "whether that is an attainable standard."

Cole reverted to the previous, lower standard at the first opportunity in granting tenure to Timothy Halpin-Healy ("Halpin-Healy"), a Barnard physics professor. Two Ad Hoc members expressed the view that they were applying

Barnard, not Columbia, standards to Halpin-Healy. Cole himself sat silent when an Ad Hoc member stated that Halpin-Healy's research, while sufficient for Barnard, would not pass muster at Columbia, in marked contrast to his insistence that Weinstock's Ad Hoc measure her against the Columbia standard. For those reasons, the Second Circuit's statement that Weinstock's "only evidence" of the differential standards was that one member of Halpin-Healy's Ad Hoc "may have expressed the opinion that his research was not up to Columbia University standards" (App. 21) is wrong, and its decision that the procedural irregularities could not have affected the outcome is in error (App. 19).

Although the majority gave lip service to the principle that "[d]epartures from procedural regularity . . . *can* raise a question as to the good faith of the process where the departure may reasonably affect the decision" (App. 18), it allowed the exception to swallow the rule, rendering the rule a virtual dead letter in academic cases.[4] The circuit splits Weinstock seeks to have resolved represent different rules of law not "in the air" but "brought to ground and visited upon an employee." *Price Waterhouse*, 490 U.S. at 251 (quotation marks omitted).

Third, Respondent protests that this case is not the proper vehicle for resolving the circuit splits Weinstock identifies because of alleged deficiencies in her factual proof. (Opp. 5, 7-8, 12-13, 15, 17) Respondent misrepresents the record. Respondent suggests that the procedural irregularities at issue here "[took] place at a far remove from the actual decisionmaker," and that therefore Weinstock is

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[4] *See Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 453-54 (2d Cir. 1999); *Zahorik*, 729 F.2d at 93; *accord Kobrin v. University of Minn.*, 121 F.3d 408, 415 (8th Cir. 1997); *Brousard-Norcross v. Augustana Coll. Ass'n*, 935 F.2d 974, 977 (8th Cir. 1991); *Banerjee v. Board of Trs. of Smith Coll.*, 648 F.2d 61, 66 (1st Cir. 1981); *but see Stern v. Columbia Univ.*, 131 F.3d 305, 313 (2d Cir. 1997) (reverse discrimination, non-tenure case).

seeking a rule that procedural irregularities "always and necessarily" and "invariably" provide evidence of pretext (Opp. 9-10), notwithstanding that the record reflects that the procedural irregularities were orchestrated by the decision-maker, Cole, and no one else. (*See supra* at 7) Accordingly, Respondent's attempt to distinguish the cases demonstrating a conflict in the circuits based on an alleged "disconnect between the decisionmaker (and his decision) and asserted procedural irregularities" (Opp. 10-12) is unavailing.

Moreover, Respondent's attempt to downplay the predominantly male composition of its workforce by trivializing it as statistics "'culled from an *amicus* brief and never presented to the district court'" (Opp. 17) must fail. Weinstock showed the "inexorable zero" – that is, the fact that when she was denied tenure there were no women in Columbia's Chemistry Department – in her submissions to the district court and the Second Circuit, which in turn prompted Respondent to boast, curiously, in its own appellate brief of having conferred tenure on a grand total of two female Chemistry professors over the course of more than forty years.

Fourth and finally, what Weinstock seeks is not a per se rule. On the contrary, what plaintiff seeks review of is an evidentiary standard in Title VII cases that renders it virtually impossible to show discrimination in an academic setting. The Second Circuit has acknowledged a division among circuits as to whether, upon proving pretext, plaintiffs survive summary judgment in the absence of conclusive evidence rebutting unlawful discrimination. *See Zimmerman v. Associates First Capital Corp.*, 251 F.3d 376, 381-82 (2d Cir. 2001). It is only fair that discrimination victims across the country and multi-state employers operate under a uniform burden-shifting paradigm.

CONCLUSION

For the foregoing reasons, and for those in the petition, the petition for writ of *certiorari* should be granted,

the judgment of the Second Circuit vacated, and the case remanded for further consideration in light of this Court's decision in *Costa*. In the alternative, the petition should be granted and the case set down for plenary briefing and argument.

Dated: New York, New York
September 11, 2003

Respectfully submitted,

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